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FILE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1983 TERM

FULCHER TRUCKING OF ORIENTAL, INC.

Petitioner

v.

JUNE KEEL GASKILL, ADMINISTRATRIX

OF THE ESTATE OF CLIFTON ALEX ARMSTRONG, SR.

Respondent

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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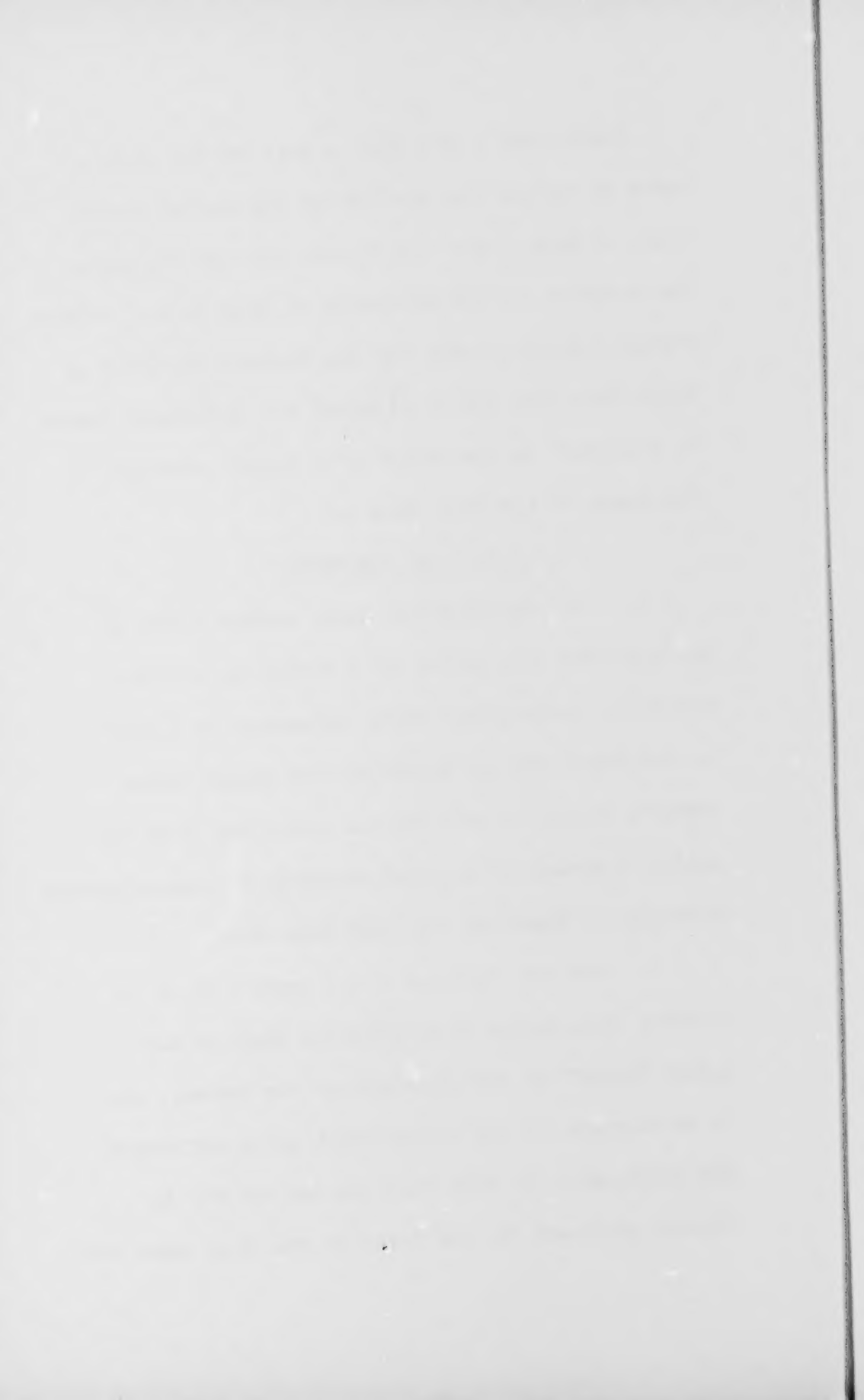


Petitioner prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fourth Circuit affirming the Judgment of The Honorable W. Earl Britt, United States District Judge for the Eastern District of North Carolina, which adjudged the Defendant liable to Plaintiff as the owner of a vessel pursuant to the Death on the High Seas Act.

QUESTIONS PRESENTED

1. Did the District Court commit error in holding that the seller of a vessel by a title retention installment sales agreement is liable to the buyer who is operating the vessel under buyer's direction and control resulting from the seller's breach of implied warranty of seaworthiness pursuant to Death on the High Seas Act?

2. Did the District Court commit error in finding that seller's stipulation that it was named "Owner" on the document of the vessel, all as an element of the installment sales agreement, was sufficient to find that the seller was an "Owner" pursuant to the Death on the High Seas Act?



PARTIES TO THE PROCEEDING BELOW

June Keel Gaskill, Administratrix of the Estate
of Clifton Alex Armstrong, Sr.

Fulcher Trucking of Oriental, Inc.

TABLE OF CONTENTS

| | |
|--|-----|
| Petition for Writ of Certiorari to the Supreme Court of the United States----- | i |
| Questions Presented----- | i |
| Parties to the Proceeding Below----- | ii |
| Table of Contents----- | iii |
| Table of Authorities----- | iv |
| Opinions Below----- | 1 |
| Jurisdictional Grounds in this Court--- | 1 |
| Constitutional Provisions and Statutes Involved----- | 1 |
| Statement of the Case----- | 3 |
| Reasons Why Petition Should be Granted- | 18 |
| Certificate of Service----- | 30 |
| Appendix: | |
| Memorandum Opinion of the United States District Court for the Eastern District of North Carolina--- | 1A |
| Order of the United States District Court for the Eastern District of North Carolina----- | 16A |
| Opinion of the Fourth Circuit Court of Appeals----- | 21A |
| Designation of Corporate Relationship----- | 27A |



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TABLE OF STATUTES

North Carolina General Statute, Chapter 25, §25-1-105 (1956)

North Carolina General Statute, Chapter 25, §25-2-401 (1965)

TABLE OF TREATISES

G. Gilmore and C. Black, The Law of Admiralty §1-10 (2nd Ed. 1975)



OPINIONS BELOW

The Memorandum Opinion of the District Court for the Eastern District of North Carolina was dated March 31, 1983, and filed on April 1, 1983. The Order of the District Court for the Eastern District of North Carolina was dated and filed on July 7, 1983. Copy of the Memorandum Opinion and Order are contained in the appendix attached hereto.

The unpublished opinion of the Court of Appeals for the Fourth Circuit was entered on February 28, 1984. A copy of the Opinion is contained in the appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on February 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION and STATUTES INVOLVED

CONSTITUTIONAL PROVISION INVOLVED: The judicial Power shall extend to all Cases, in Law and



Equity, arising under this Constitution, the Laws of the United States, the Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. U. S. Constitution Art. III, §2, cl.1.

STATUTES INVOLVED: Whenever a death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States in admiralty, for



the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued. Death on the High Seas by Wrongful Act, 46 U.S.C. §761 (1920).

North Carolina General Statute §25-2-401 (1965)

North Carolina General Statute §25-1-105 (1965)

STATEMENT OF THE CASE

The Plaintiff-Administratrix filed an action in the United States District Court for the Eastern District of North Carolina on February 5, 1982, alleging four (4) causes of action against the Defendant:

(1) That the decedent died as a result of the Defendant's breach of its warranty of seaworthiness and that, therefore, the Defendant was liable under the provisions of the Death on the High Seas Act, 46 U.S.C. 761-768;

(2) The Defendant was negligent and liable under the Jones Act, 46 U.S.C. 688;

(3) The Defendant was liable for breach of express and implied warranties of fitness; and

(4) The Defendant was negligent by knowingly selling a vessel to the Decedent which would not withstand conditions of seafood harvesting.

A trial was held before the Court, sitting without a jury, 20 January 1983 and a Memorandum Opinion was filed on April 1, 1983, making conclusions of law to the effect that the Defendant was the owner of the vessel involved, the DOLPHIN, that she was unseaworthy and the Defendant failed to protect Plaintiff's intestate against the hazards of maritime service and that the death of Plaintiff's intestate was proximately caused by the unseaworthy condition of the vessel DOLPHIN; that the death occurred on the high seas beyond a marine league from the shores of North Carolina; that the Plaintiff was the personal representative of Decedent; that the action was filed within the statute of limitation; and that the Defendant was liable under the Death on the High Seas Act to the Plaintiff; and the Court further finding that it wished to hear further evidence on damages and directed that the matter be re-calendared for further evidence on the

damage issue.

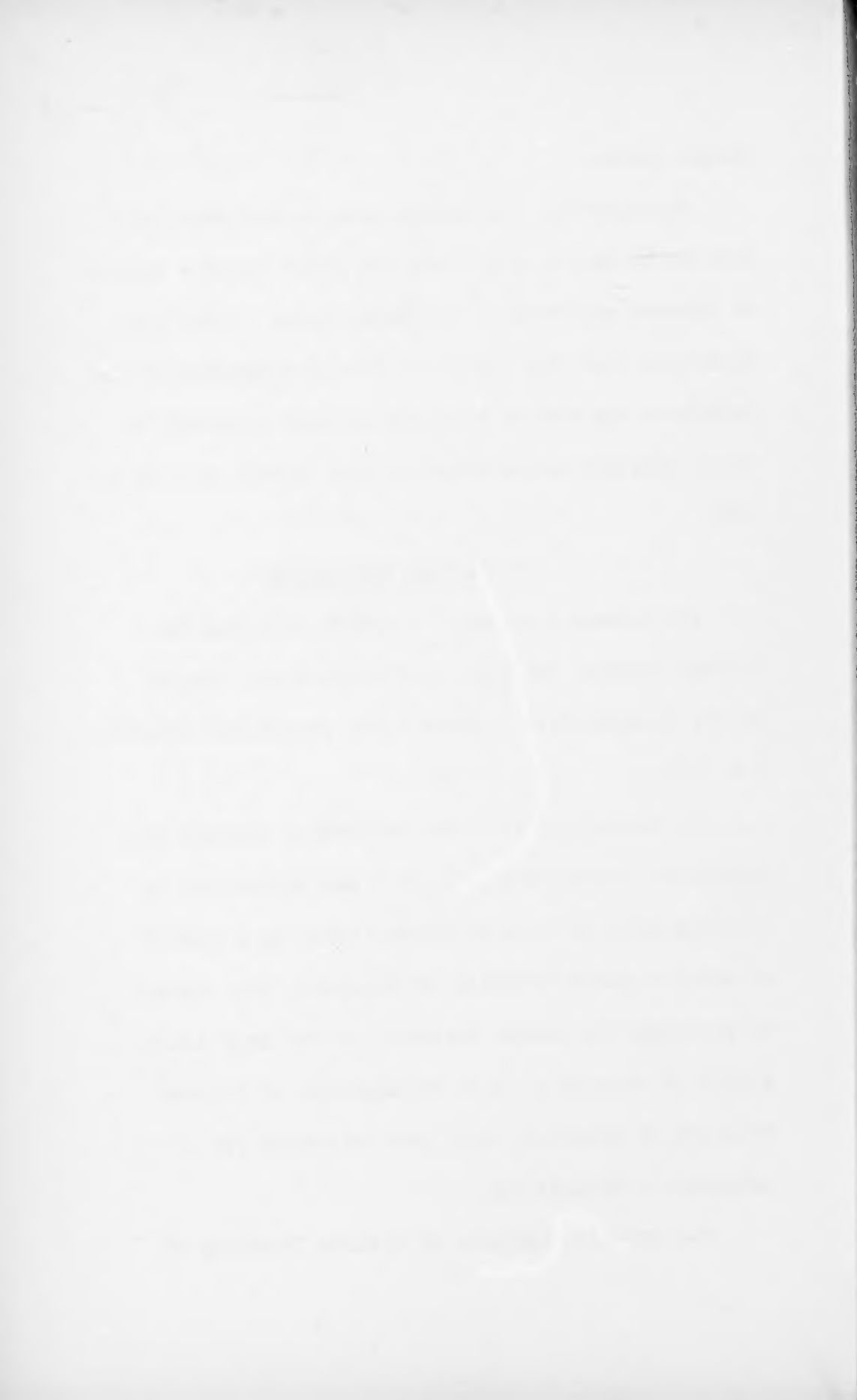
Subsequently the matter came on for additional hearing on May 2, 1983, and the Court heard evidence on damages and entered its Order dated 7 July 1983 directing that the Plaintiff have and recover of the Defendant the sum of \$116,250.00 with interest, to which Judgment was entered to said effect on July 8, 1983.

THE FACTUAL BACKGROUND

The vessel involved: DOLPHIN, Official No. 258728, fishing service, 32.8 gross tons, length 52.2', breadth 15.9', depth 5.6', propulsion diesel, H.P. 165.

In January of 1979 the Defendant, through its President, Gaston Fulcher, Jr., was approached by one Gene Boyd of S. & B. Enterprises, as a result of which Fulcher Trucking of Oriental, Inc. agreed to purchase the vessel DOLPHIN. A few days later, a bill of sale by S. & B. Enterprises to Fulcher Trucking of Oriental, Inc. was delivered (Tr. 20, Defendant's Exhibit #2).

The general business of Fulcher Trucking of



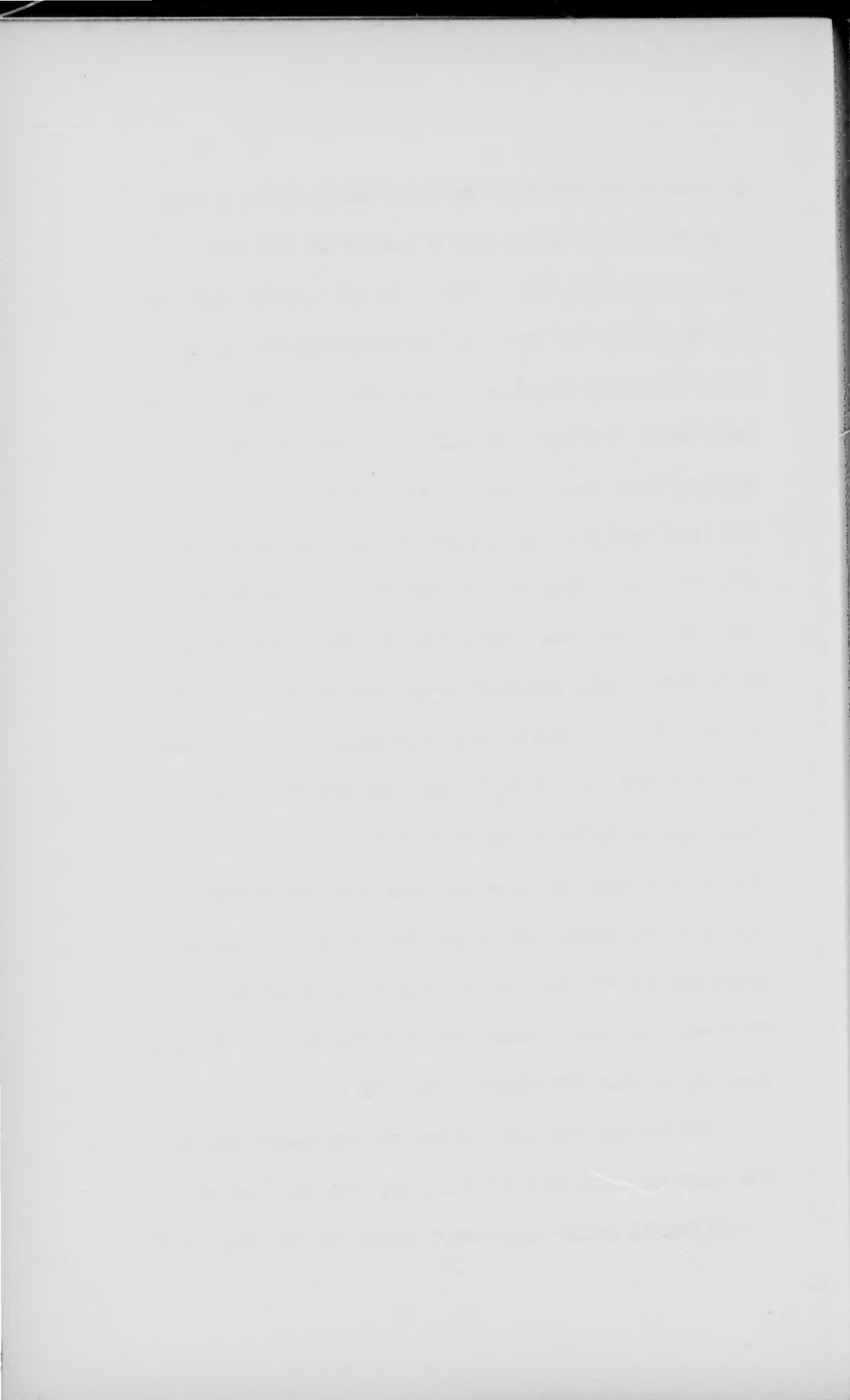
Oriental, Inc. is a hauler of seafood and it deals in seafood, crabs, fish and scallops (Tr. 8) and had no other vessels (Tr. 18). The only vessel that the Defendant ever had was DOLPHIN (Tr. 18). The stockholders of the Defendant owned a part of two (2) commercial trawlers and a seafood company. The seafood company had one vessel fishing for it (Tr. 33). The Defendant had planned to utilize said boat in a fishing enterprise but the basic reason for purchase was because S. & B. Enterprises was going to obtain a larger boat which would deliver its catch to the related businesses (Tr. 20, 21). Nearly all of the supply of seafood to Defendant's related company was furnished by boats owned by outsiders.

After a deal had been made between the Defendant and S. & B. Enterprises, the DOLPHIN was delivered to Defendant's dock in the Town of Oriental, North Carolina, and following delivery the Defendant, through Gaston Fulcher, Jr., was approached by the Decedent, Clifton Armstrong, who stated that he would like to buy the DOLPHIN, that



he always worked with somebody else, always made them money but never had a chance of his own to own a boat (Tr. 22). The Decedent stated that he had no money but that, if arrangements could be made, he would be able to pay for the vessel. The Defendant, through its officers, was of the opinion that the Decedent would diligently work the boat and pay the indebtedness and, as a result thereof, they did agree to sell the vessel (Tr. 23). At this time, the Decedent was Captain of a steel hull trawler named NEW BREED (Tr. 77) and Decedent, despite his statement to the Defendant, did not intend to leave the NEW BREED as he "was buying DOLPHIN for his oldest boy and he got one of his regular crew to take the NEW BREED out and work on these two trips and he was on there checking it out before he gave it to that boy. . . that was the only reason he was buying it. He was staying on the NEW BREED" (Tr. 78).

Following the conclusion of the negotiations, the parties employed an attorney who drafted an installments sales agreement dated 19 January 1979



(Defendant's Ex. #1), with the essential elements of the installment sales agreement to the effect that the Decedent was to take possession of the vessel, fish it, maintain the vessel by periodically painting it, deliver its product to the seller during the North Carolina shrimping season provided that the seller paid the same market value it paid other vessels, with the proceeds received for the catch to be deposited in a joint checking account which would be used to pay the cost of the vessel's operation, including crew and and Captain's wages, insurance, and to pay the purchase price and interest due seller; with a further provision that, if the seller should purchase additional equipment for the buyer, the cost would be added to the indebtedness and paid for accordingly. It further provided that, upon completion of the payment of the purchase price, full bill of sale would be delivered to the buyer by the seller.

Prior to the Defendant's purchasing the DOLPHIN, Defendant's Officers had seen the DOLPHIN around the harbor for several years, had observed

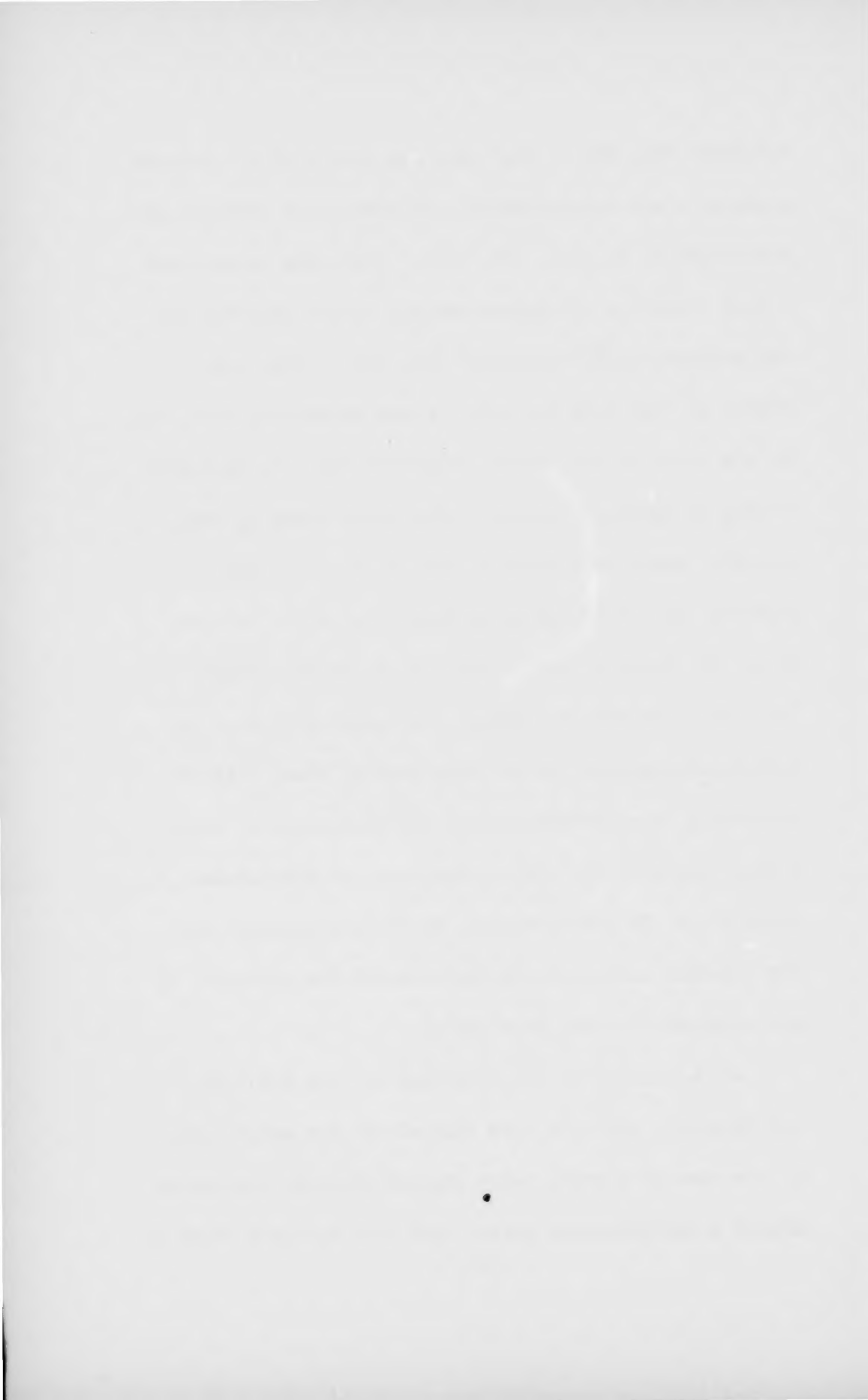
it in the water and had made no inspection other than visually at its site in the water (Tr. 9). The Decedent was also familiar with the boat generally and had been aboard the boat before it was purchased by the Defendant (Tr. 80). At the time that the Defendant purchased the boat from S. & B. Enterprises, it was insured for the sum of \$25,000.00. Its policy was transferred from the previous owner to the Defendant (Tr. 11). This insurance covered only the hull.

The Defendant agreed to advance for the Decedent a fathometer and some nets (Tr. 14). After the Decedent took physical possession of the boat, the Decedent made arrangements with Neuse Ways for the boat to be raised out of the water to install the transducer for the fathometer (Tr. 24) and the boat was hauled. Neither the Defendant nor its agents had anything to do with this hauling, all arrangements being made by Decedent. The Decedent oversaw the work done on the boat during its hauling (Tr. 25) and, during the hauling, the



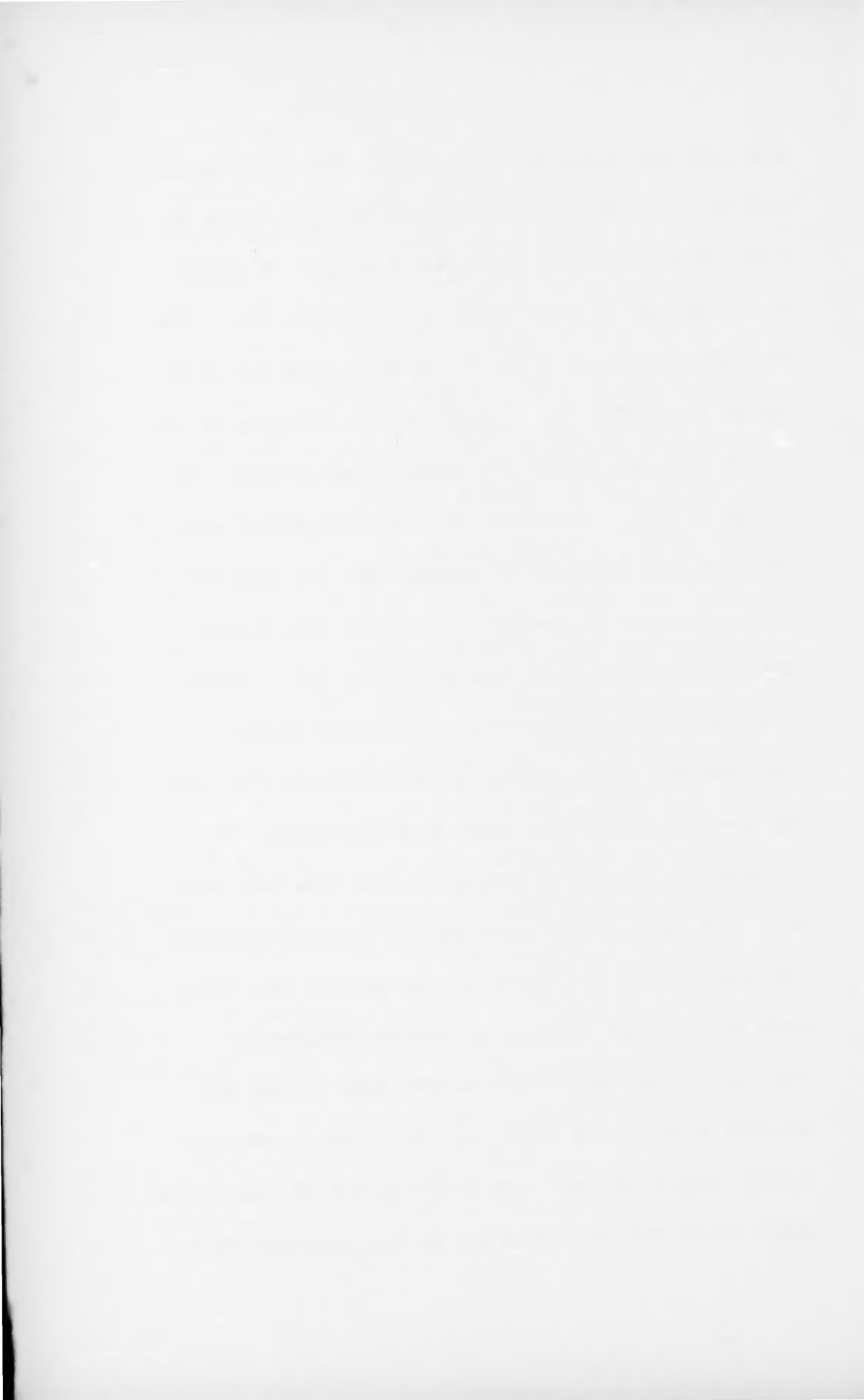
Decedent did work to the rudder stock. After the vessel was launched from the railways, the Decedent and his crew whom he had employed (Tr. 44) went on a floundering trip in the Atlantic Ocean (Tr. 42). There was no representations made by Defendant to the Decedent or anyone else about the condition of the vessel (Tr. 28). The Decedent took complete control of the vessel, made all decisions about where she was to fish (Tr. 29) and on or about February 7, 1979, the Decedent with his crew, including his son, Clifton Timmy Armstrong, left to go on a fishing trip (Tr. 34) and on or about February 9, 1979, the vessel was fishing between 9 and 12 miles in the Atlantic Ocean off Hatteras Inlet. There were other boats in the area and it was windy but there wasn't much sea and suddenly there was a change in the weather (Tr. 35). The wind commenced blowing and the seas began building and at this time the boat was iced, loaded with fuel (Tr. 48) and her hold was full of fish with all that the bins would hold (Tr. 49). The tow (net) was being

made and the decks were cluttered with fish equivalent to 75 boxes and the net was being brought in with additional fish which had a weight of about 20,000 pounds of fish being on deck (Tr. 52). The seas were probably 5' or 6' at this time and picking up fast (Tr. 53). Later on the sea came up to 12' to 15' (Tr. 53). The vessel then dumped 3 or 4 bags of fish. However, the net was untied and the fish were allowed to escape (Tr. 52) and the vessel started in towards shore with the course head on, straight into the wind (Tr. 54). After they steamed approximately a couple of miles, they noticed water coming in the bow area (Tr. 54). The bow and stern were down with the weight (Tr. 54) and the seas were coming in over the bow (Tr. 55). The seas would break on the bow and roll all the way down to the stern of the vessel (Tr. 55), some of the deck load being washed overboard (Tr. 55). The vessel was slowed down to try to salvage some of the fish (Tr. 56). Water was observed coming through the stuffing box of the rudder shaft which had been stuffed by the Decedent back



when the vessel was on Neuse Ways and had been stuffed also at a previous time on the floundering trip. Water was observed coming through the bow about 2' above her deck. The Decedent attempted to tighten the stuffing box and the rudder (Tr. 56). The pumps were working. However, the strainers were not checked by the testifying crew member (Tr. 57). The vessel had moved 2 or 3 miles towards the beach before the leaks were noticed (Tr. 57). The seas were 12' to 15' high at this time (Tr. 58). The vessel was not slowed down until water was observed coming in (Tr. 58). The vessel at no time was put stern to, to run with the seas, or to avoid the pressure of the seas on the loaded boat (Tr. 58). In addition to the load of fish on the boat, the boat was carrying its trawl doors which weighed approximately 1,000 pounds. These trawl boards were hanging alongside the boat. Wooden boats, when they have a heavy load, have a tendency to work and the caulking works out (Tr. 67).

Direct examination of Eugene Boyd revealed that he used the DOLPHIN for foundering 4 to 5 miles



offshore (Tr. 84). That she was built of 1" juniper planking, was approximately 25 years old when it was purchased by S. & B. (Tr. 84). That the vessel had a fuel capacity of approximately 1,200 gallons and 300 gallons water capacity (Tr. 85). That the vessel at the time he sold it was seaworthy (Tr. 86). On the date of the storm, February 9th, he was also at sea in another vessel. The storm came up very quickly, seas were running 15' to 17', it was blowing 65 to 70 miles an hour (Tr. 87). He was on an 80' trawler and 2 stays broke on his vessel (Tr. 88). He turned around and came back in. On cross-examination the witness stated that Clifton Armstrong, the Decedent, had a reputation of being a good Captain (Tr. 91). Response on the cross-examination to the question as to his opinion why the DOLPHIN sank, in the opinion of the witness, it was because she was overloaded.

As a result of the distress of the DOLPHIN, the Decedent and his crew jumped in the water and, by the use of a rope, were pulled through the water aboard a neighboring vessel and the Decedent died in



the process (Tr. 39, 40).

STIPUALATIONS BETWEEN THE PARTIES

As an element of the pre-trial Order, it was stipulated:

1. That Fulcher Trucking of Oriental, Inc. was the owner of DOLPHIN as shown by her documents.

2. That the installment sales agreement, Exhibit #1, was genuine and was executed by Plaintiff's Decedent and the Defendant and that Plaintiff's Decedent was aboard said vessel DOLPHIN on February 9, 1979, pursaunt to said installment sales contract.

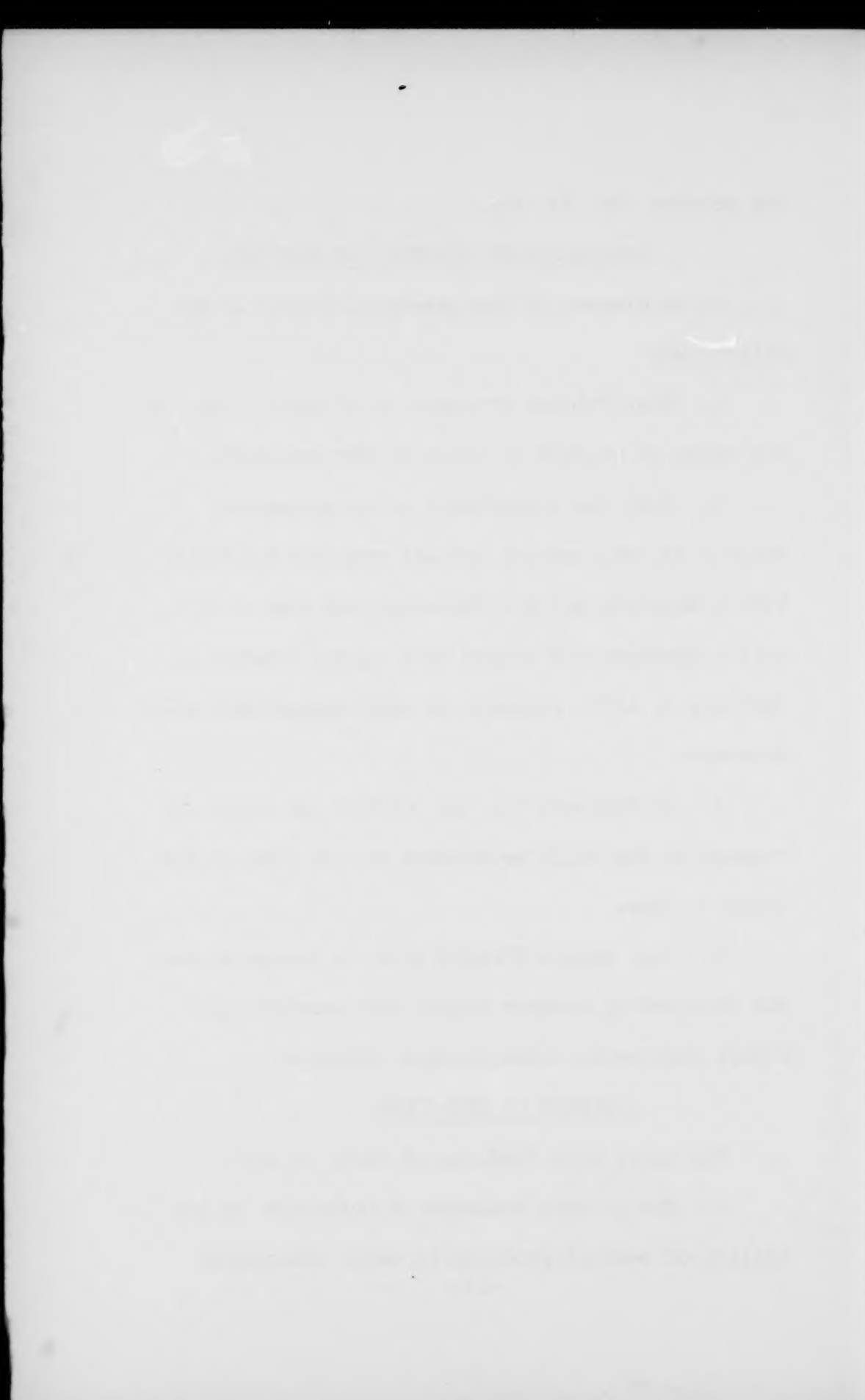
3. On February 9th the DOLPHIN was under the command of Plaintiff's Decedent at the time of the vessel's loss.

4. That before DOLPHIN sank, a rescue attempt was effected by another vessel and Decedent died before the rescue attempts were completed.

JUDGMENT OF THE COURT

The Court made findings of fact, to wit:

1. The primary business of Defendant is the hauling of seafood produced by other businesses



owned by Defendant's stockholders.

2. Most of the products processed by G & C Seafood House (seafood business owned by Defendant's stockholders) came from privately owned boats, although in the past members of the Defendant's family have owned and operated fishing trawlers.

3. That the Fulchers, through their seafood house, furnished provisions such as gas, groceries, ice, etc., and deducted the amounts from the proceeds of catches that were brought in and processed.

4. That the Fulchers became aware that the DOLPHIN was for sale and, needing another boat to produce seafood for their company, made arrangements to buy it.

5. That the title to the DOLPHIN was transferred from the former owner to the Defendant.

6. That the Defendant's President did not inspect the vessel before purchase but merely looked at it in the water and saw nothing outwardly wrong with it.

7. The Defendant insured the vessel for \$25,000.00 which was collected after loss.

8. The Plaintiff's Decedent was known to Defendant's stockholders, he having worked for them as Captain on a fishing vessel some years before.

9. At the time the DOLPHIN was purchased by Defendant, negotiations were begun with Plaintiff's Decedent to sell the vessel to him, which negotiations culminated in the installment sales contract entered into between Defendant and Plaintiff's Decedent.

10. The Court found what the provisions of the installment sales contract were, all as heretofore set forth.

11. Plaintiff's Decedent had the vessel hauled and new equipment installed thereon.

12. Prior to the trip in which loss was sustained, one fishing trip was made and the proceeds disbursed in accordance with the terms of the installment sales contract.

13. On 9 February 1979, while the vessel was off Hatteras Inlet, the weather took a sudden change for the worse.

14. Because of the weather, the DOLPHIN started

to port, during which time it started taking on water.

15. Although the vessel was leaking some around the rudder stock, the pumps were working, were adequate to rid the vessel of the water. The vessel was leaking through the hull into the engine room and the hold.

16. After taking on water, the vessel's engines submerged causing a loss of power and the subsequent abandonment of ship by the crew.

The balance of the findings related to departure of the crew from the vessel and the death of Plaintiff's Decedent as a result of exposure due to "sea water emersion".

The Court concluded as a matter of law:

1. That the Defendant was the "owner" of the vessel DOLPHIN on 9 February 1979.

2. That the vessel was unseaworthy and "the Defendant failed to protect Plaintiff's Decedent against the hazards of maritime service."

3. That the Defendant would have been liable if death had not ensued.



4. "8. Having found the Defendant liable under DOHSA, the Court finds it necessary to determine the Plaintiff's claim under the Jones Act."

REASONS FOR GRANTING THE PETITION

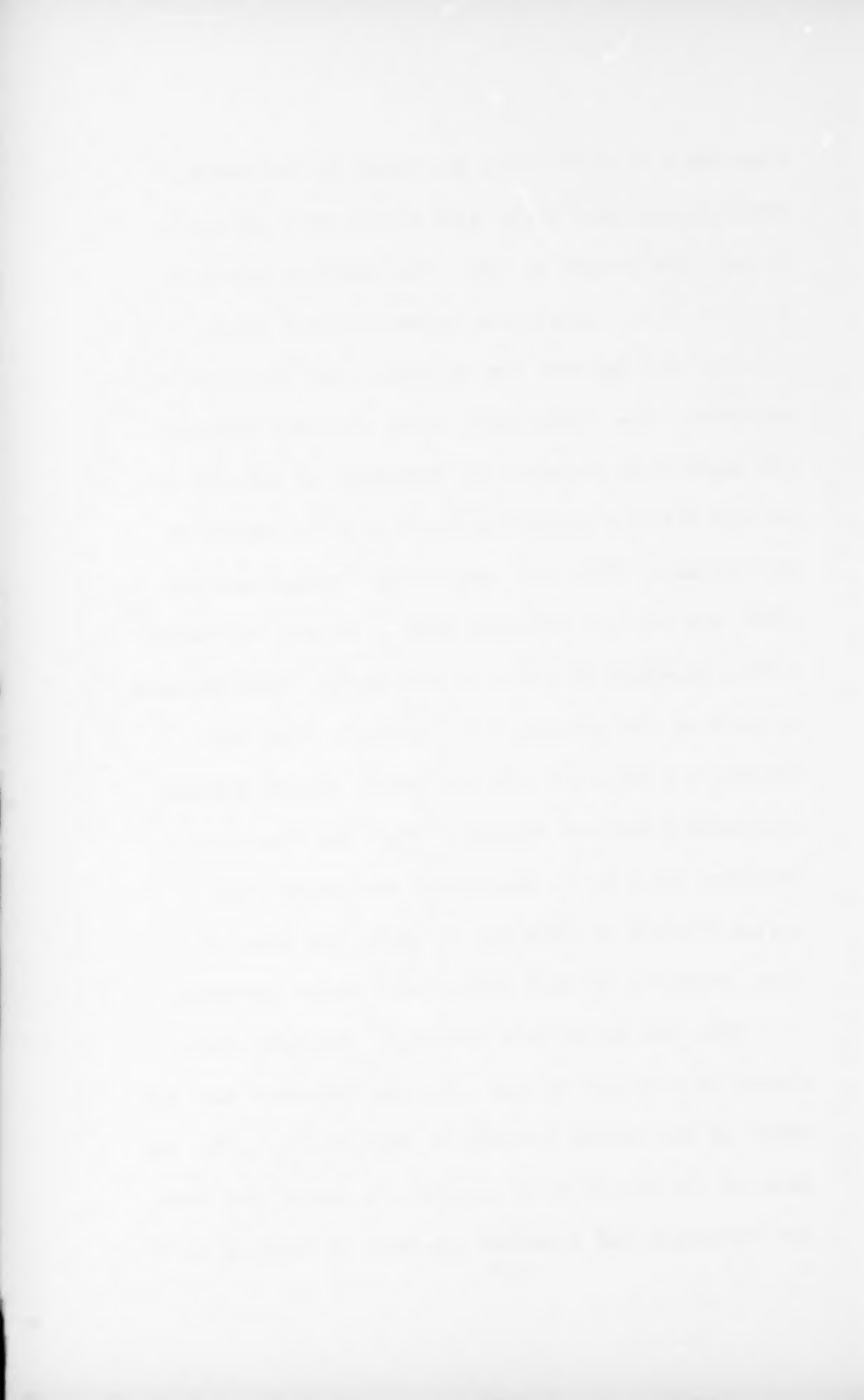
The decision below should be reviewed as it is a case of first impression in that it has applied to the seller of a vessel, who sells a vessel by a title retention installment sales contract, the absolute duty of an owner of a vessel to provide a seaworthy vessel. The decision below is in conflict with the decisions of this Court in Stewart and Company v. Rivara, 274 U.S. 614, 47 S. Ct. 718, 71 L. Ed. 1234 (1927), Buckley v. Honold, 60 U.S. (19 HOW) 390, 15 L. Ed. 663 (1856), and numerous decisions from our Circuit Court of Appeals concerning the appropriate law to determine ownership of the vessel.

The Court in its Findings of Facts found that the Defendant had purchased the F/V DOLPHIN. Transfer of title was effected by bill of sale to the Defendant and documents showing the Defendant as the owner issued accordingly. That on or about the



time the F/V DOLPHIN was purchased by Defendant, negotiations were begun with Plaintiff's Decedent to sell the vessel to him. The negotiations culminated in an installment sales contract being entered into between the Defendant and Plaintiff's Decedent. The installment sales contract provided for payment by Decedent to Defendant of \$28,000.00 through monthly installments of \$639.83 beginning in February, 1979, and continuing through January, 1984, and for the transfer from Defendant to Plaintiff's Decedent of title to the vessel "upon payment in full of the sum set forth herein"; that the Plaintiff's Decedent had the vessel hauled and new equipment installed thereon. That the Plaintiff's Decedent, Clifton A. Armstrong, was aboard the vessel DOLPHIN on February 9, 1979, the date of loss, pursuant to said installment sales contract.

Upon the above fact findings, the Court concluded as a matter of law that the Defendant was the owner of the vessel DOLPHIN on February 9, 1979, the date of the Plaintiff's intestate's death, and that the Defendant had breached its duty in failing to



protect Plaintiff's Decedent against the hazards of maritime service and thereby the Defendant was liable under the Death on the High Seas Act to Plaintiff's Decedent's estate.

There is no question that the owner of a ship has an absolute duty to furnish a seaworthy ship. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926 (1960). The question in the instant case is who was the owner of the vessel DOLPHIN on February 9, 1979, the date of its loss, and therefore had the duty to provide a seaworthy vessel. We urged at trial and re-urge at this time that the law governing the installment sales contract entered into by the parties is the law that determines the ownership of the vessel and that the law is the law of the State of North Carolina.

Generally, a contract for the sale of a vessel is not a maritime contract and is not cognizable in admiralty. Bogart, et al v. The John Jay, 58 U.S. (17 HOW) 399 (1954); The Ada, 250 F. 194 (2d. Cir. 1918); Grand Banks Fishing Co. v. Styron, 114 F. Supp. 1 (D. Me. 1953); Flota Maritima Browning v.

Snobl, 363 F. 2d. 733 (4th Cir. 1965); Puamier v. Barge BT 1793, et al, 395 F. Supp. 1019 (E.D. Va. 1974); Noel v. United Aircraft Corp., 204 F. Supp. 929 (D.C. Del. 1962); Gilmore and Black, Law of Admiralty, 2d. Ed., Chapter 1, §1-10 (1975). Only in certain circumstances can the ownership of a vessel be litigated in admiralty. For instance, a "petitory suit" which requires that the Plaintiff already hold legal title, The Amelia, 23 F. 406 (C.C.S.D.N.Y. 1877); Stathos v. The Maro, 134 F. Supp. 330 (E.D. Va. 1955); Silver v. Sloop Silver Cloud, 259 F. Supp. 187 (S.D.N.Y. 1966); Puamier v. Barge BT 1793, supra, or where the cause of action is within the jurisdiction of the admiralty, the Court has authority to decide a question of the ownership of a vessel incidental to such jurisdiction. The Hamburg, 298 F. 942 (D.C.N.Y.).

In determining the proper owner of a vessel, the admiralty law does not have any form of action akin to the common law action to quiet title to land. Puamier v. Barge BT 1793, supra. For over a century the Supreme Court has held that the

question of the validity of the sale of a vessel is to be resolved by reference to the appropriate state law, not the general maritime law. Stewart and Company v. Rivara, supra; Buckley v. Honold, supra; Sturgis v. Honold, 60 U.S. (19 HOW) 393, 15 L. Ed. 666 (1856). The appropriate state law is to be determined by considering several factors. First, there is the intention of the parties; second, the place where the contract was made or entered into; third, the place where the contract was to be performed. Jasson v. Swedish American Line, 185 F. 2d. 212 (C.A. Mass. 1950). In the present case, the installment sales contract was entered into by the Plaintiff's Decedent and the Defendant in the State of North Carolina and the contract was to be performed in North Carolina. The contract did not indicate that the parties desired or intended for any other law to apply. Therefore, the appropriate state law to determine the ownership of the F/V DOLPHIN on the date of its loss is the law of North Carolina.

The next question that arises is what segment



of the law of North Carolina is appropriate to determine the respective relationships between the parties. The State of North Carolina adopted the Uniform Commercial Code in 1965. Section 25-1-105 of the Uniform Commercial Code as adopted by North Carolina provides:

"Territorial application of the act; parties' power to choose applicable law.--(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this State and also to another state or nation the parties may agree that the law either of this State or of such other state or nation shall govern their rights and duties. Failing such agreement this chapter applies to transactions bearing an appropriate relation to this State. North Carolina General Statutes §25-1-105 (1965).

A number of the Courts have determined that ships are "goods" within the meaning of the Uniform Commercial Code. Fireman's Fund American Co. v. Boston Harbor Marina, Inc., 406 F. 2d. 917 (1st Cir. 1969); Jones v. One Fifty Food Gulfstar Sailing Yacht, Hull No. 01, 625 F. 2d. 44 (5th Cir. 1980); R. C. Craig, Ltd. Ships of Sea, Inc., 345 F. Supp. 1066 (S.D. Ga. 1972); Silver v. Sloop

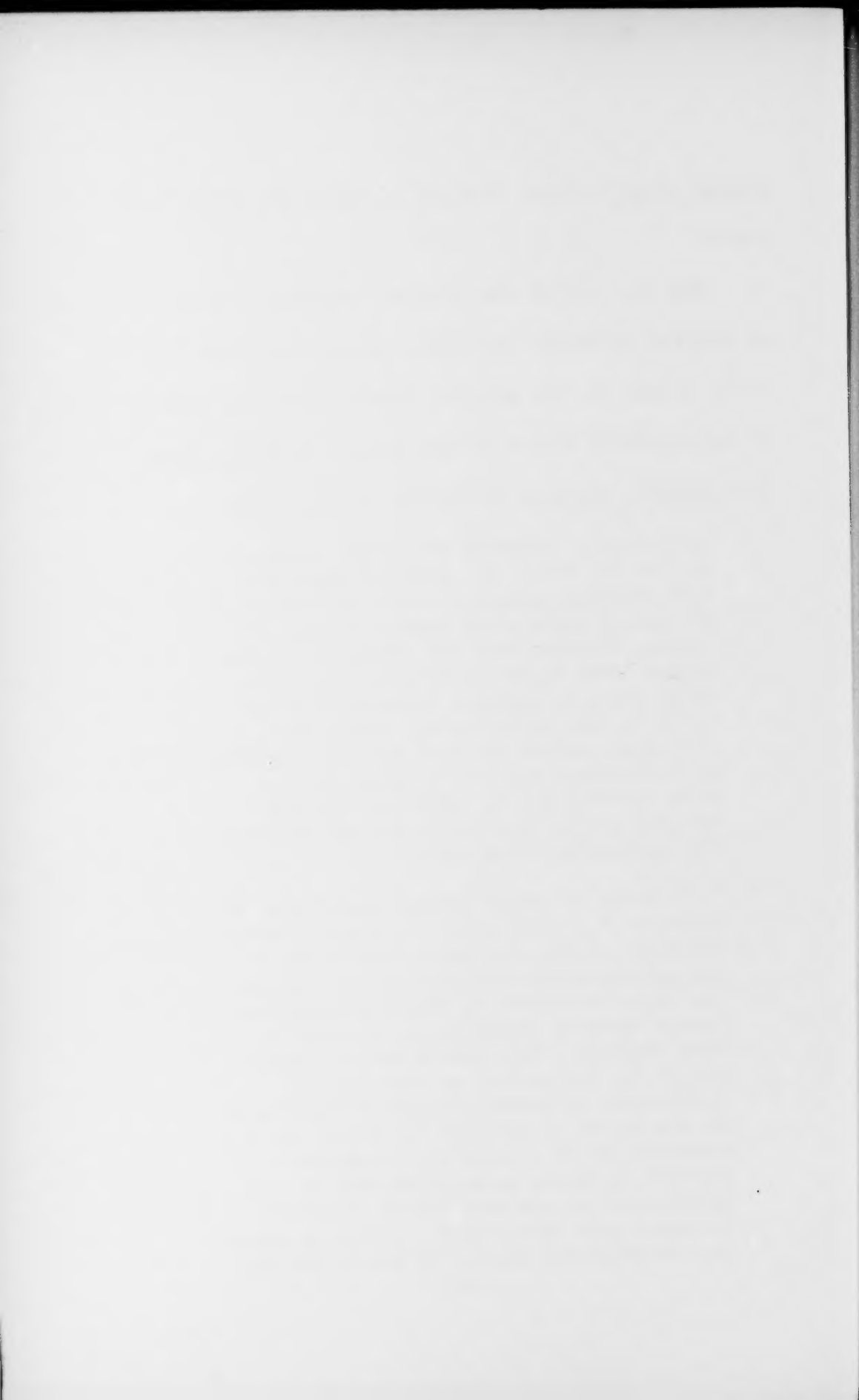


Silver Cloud, supra; Puamier v. Barge BT 1793,
supra.

The section of the Uniform Commercial Code,
as adopted by North Carolina, concerning when
title passes on the sale of "goods" and the effect
of retention of title by the seller is North Caro-
lina General Statute §25-2-401, to wit:

"§25-2-401. Passing of title; reser-
vation for security; limited applica-
tion of this section.—Each provision
of this article with regard to the
rights, obligations and remedies of the
seller, the buyer, purchasers or other
third parties applies irrespective of
title to the goods except where the
provision refers to such title. Insofar
as situations are not covered by the
other provisions of this article and
matters concerning title become material
the following rules apply:

"(1) Title to goods cannot pass under a
contract for sale prior to their identi-
fication to the contract (§25-2-501),
and unless otherwise explicitly agreed
the buyer acquires by their identifica-
tion a special property as limited by
this chapter. Any retention or reser-
vation by the seller of the title
(property) in goods shipped or delivered
to the buyer is limited in effect to a
reservation of a security interest.
Subject to these provisions and to the
provisions of the article on secured
transactions (article 9), title to goods
passes from the seller to the buyer in



in any manner and on any conditions explicitly agreed on by the parties.

"(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest of the bill of lading

"(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

"(b) if the contract requires delivery at destination, title passes on tender there.

"(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

"(a) if the seller is to deliver a document of title, title passes at the time and place where he delivers such documents; or

"(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.



"(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such reversioning occurs by operation of law and is not a 'sale.'"

In the instant case, there was no dispute that the Defendant and Plaintiff's Decedent entered into an installment sales contract on January 24, 1979, whereby the Plaintiff's Decedent purchased the vessel DOLPHIN from the Defendant. Pursuant to said installment sales contract, there was a reservation of title by the seller until all purchase money was paid. There was no dispute that the Plaintiff's Decedent, Clifton A. Armstrong, was aboard the vessel DOLPHIN on February 9, 1979, the day the vessel was lost, pursuant to said installment sales contract. It is clear under North Carolina General Statute §25-2-401 that, where there has been a delivery of "goods" to the buyer, a reservation of title by the seller is limited in effect to a reservation of a security interest, Toyomenka, Inc. v. Mount Hope Finishing Co., 432 F. 2d. 722 (4th Cir. 1970); North Carolina General Statute 25-2-401(2).



In applying the facts to the law as hereinabove stated, it is clear that the Plaintiff's Decedent, Clifton A. Armstrong, was the owner of the vessel DOLPHIN on February 9, 1975, and that the Defendant's only interest in said vessel was that of a security interest. It necessarily follows that, since the Defendant was not the owner of the vessel DOLPHIN on February 9, 1979, that it did not have the duty to provide the Plaintiff's Decedent a seaworthy vessel pursuant to general maritime law or the Death on the High Seas Act. Yet, the Trial Court completely disregarded the law as hereinabove stated that was brought to its attention at the trial of this matter, and found as a conclusion of law that the Defendant was the owner of the vessel DOLPHIN on February 9, 1979, and thereby had an absolute duty to provide Plaintiff's Decedent, Clifton A. Armstrong, a seaworthy vessel.

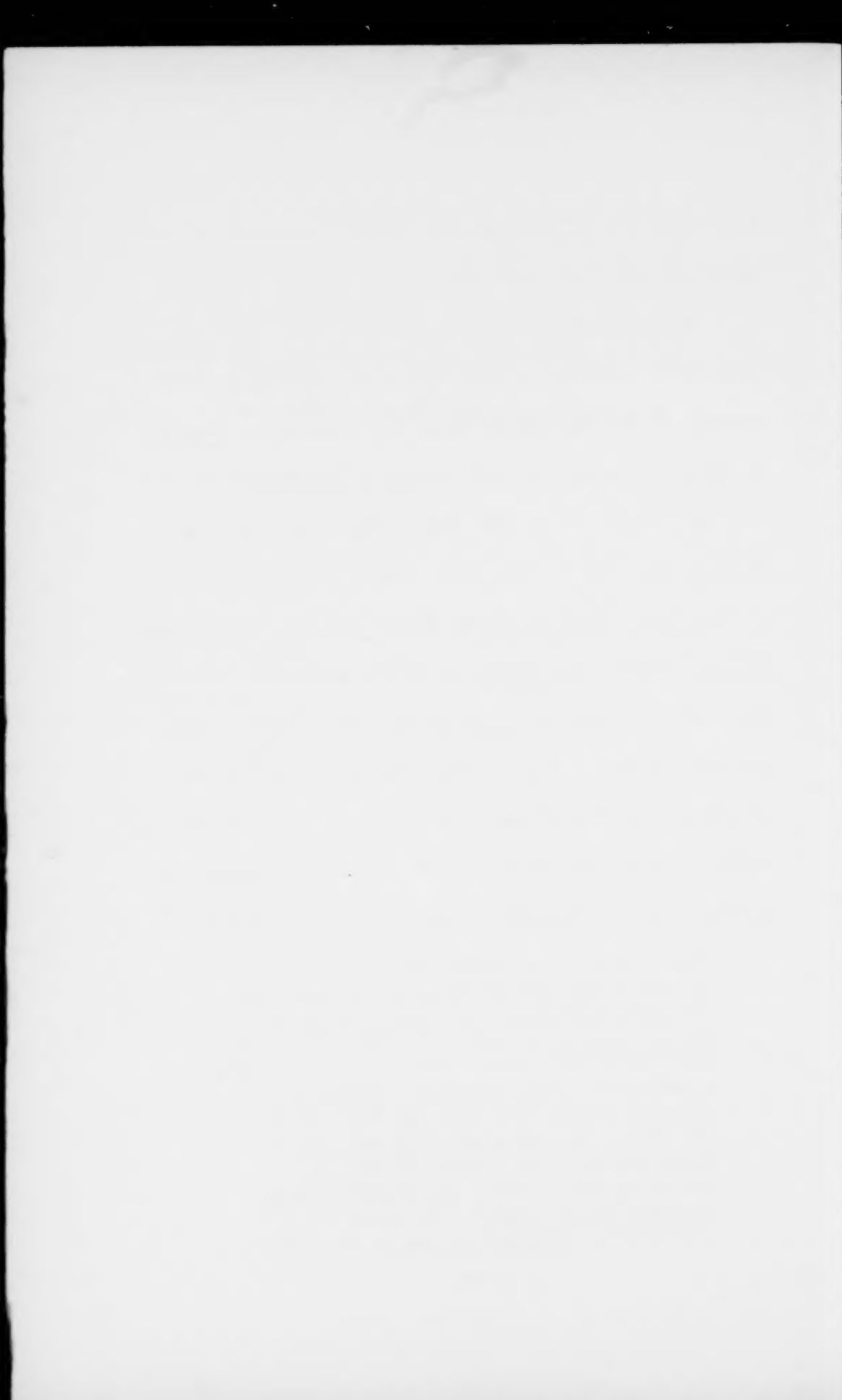
2. The District Court erred in finding that the seller's stipulation that it was named "owner" on the document of the vessel, all as an element of the installment sales agreement, was sufficient to



find that the seller was an "owner" pursuant to the Death on the High Seas Act.

The Supreme Court and various lower Courts have held repeatedly that the true ownership of a vessel is not dependent upon its registry. Stewart v. Rivara, supra, at 618; Hozey v. Buchanan, 41 U.S. (16 Pet.) 215, 10 L. Ed. 941 (1842); Southern Bell T. & T. Co., 62 F. 2d. 1015 (5th Cir. 1933); Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht, Hull No. 01, supra, The Kitty C, 20 F. Supp. 173 (S. D. Fla. 1937); Puamier v. Barge BT 1793, supra. The purpose of the registry statutes is to afford to properly registered American vessels benefits provided by the laws of the United States. Stewart v. Rivara, supra; Puamier v. Barge BT 1793, supra.

"The registry statutes were intended to encourage and stimulate the American shipping industry, Old Dominion S. S. Co. of Virginia, 198 U.S. 299, 25 S. Ct. 686, 49 L. Ed. 1059 (1905), not to create a national title statute. Stewart v. Rivara, supra, 274 U.S. at 618, 47 S. Ct. 718. See generally 70 Am. Jr. 2d, Shipping §§39-94 (1966) 48 Am. Jr., Shipping §64 (1943); 12 United States Supreme Court Digest, Shipping §§ 9(i) (r) (1967). Puamier v. Barge BT 1793,



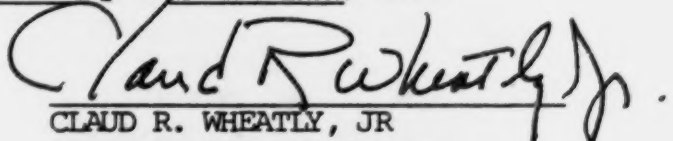
supra, at 1030".

In Puamier, id., a case similar to the instant case, which involved the sale of a tug and barge where no bill of sale was ever transferred and the tug and barge were never re-registered, the Court held that a stipulation by the seller that it is the record owner does not bear on who the actual owner is.

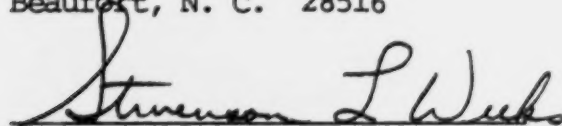
CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Peition for a writ of certiorari should be granted.

This the 1st day of June, 1984.



CLAUD R. WHEATLY, JR
Attorney for Peitioner
Fulcher Trucking of
Oriental, Inc.
P.O. Drawer 360
Beaufort, N. C. 28516



STEVENSON L. WEEKS
Attorney for Petitioner
Fulcher Trucking of
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P.O. Drawer 360
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CERTIFICATE OF SERVICE

The undersigned hereby certified that he served a copy of the foregoing Peition upon the attorney for Respondent by depositing a copy of same in the U. S. mails, with sufficient postage thereon, addressed to:

Mr. Neil B. Whitford
Cooper and Whitford
Attorneys at Law
P.O. Box 99
Atlantic Beach, NC 28512

This the 5th day of June, 1984.



STEVENSON L. WEEKS
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Fulcher Trucking of
Oriental, Inc.
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Telephone: (919) 728-3158



APPENDIX



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION

No. 82-11-CIV-4A

JUNE KEEL GASKILL)
formerly June Keel)
Armstrong),)
Administratrix of the)
Estate of CLIFTON ALEX)
ARMSTRONG, SR.,)
deceased,)
Plaintiff)
v.)
FULCHER TRUCKING OF)
ORIENTAL, INC.,)
Defendant)

F I L E D

Apr 1 1983

MEMORANDUM OPINION

Plaintiff, June Keel Gaskill (formerly June Keel Armstrong), brought this action as Administratrix of the Estate of her husband, Clifton Alex Armstrong, Sr. (hereinafter referred to as Decedent), against Defendant, Fulcher Trucking of Oriental, Inc., a North Carolina Corporation. The action arises as a result of Decedent's death in a storm during the sinking of the fishing trawler, F/V Dolphin on 9 February 1979. Plaintiff advances four causes of action: (1) Decedent died as a result of Defendant's breach of its warranty of



seaworthiness and that, therefore, Defendant is liable under the provisions of the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-768 (1975);

(2) Defendant was negligent and liable under the Jones Act, 46 U.S.C. § 688 (1975);

(3) Defendant is liable for breach of express and implied warranties of fitness; and

(4) Defendant was negligent by knowingly selling a vessel to Decedent which could not withstand the conditions of seafood harvesting. Plaintiff seeks:

(1) \$50,000.00 for damages sustained by Decedent prior to his death for pain and suffering; (2)

\$500,000.00 for Decedent's dependents, including loss of society, nurture, training, education, guidance, and support and maintenance;

(3) \$50,000.00 for the loss of Decedent's heirs and next of kin; and (4) the costs of this action.

On 20 January 1983, a trial was held before the Court sitting without a jury. In the pretrial order, the parties agreed to the following pertinent

1

I

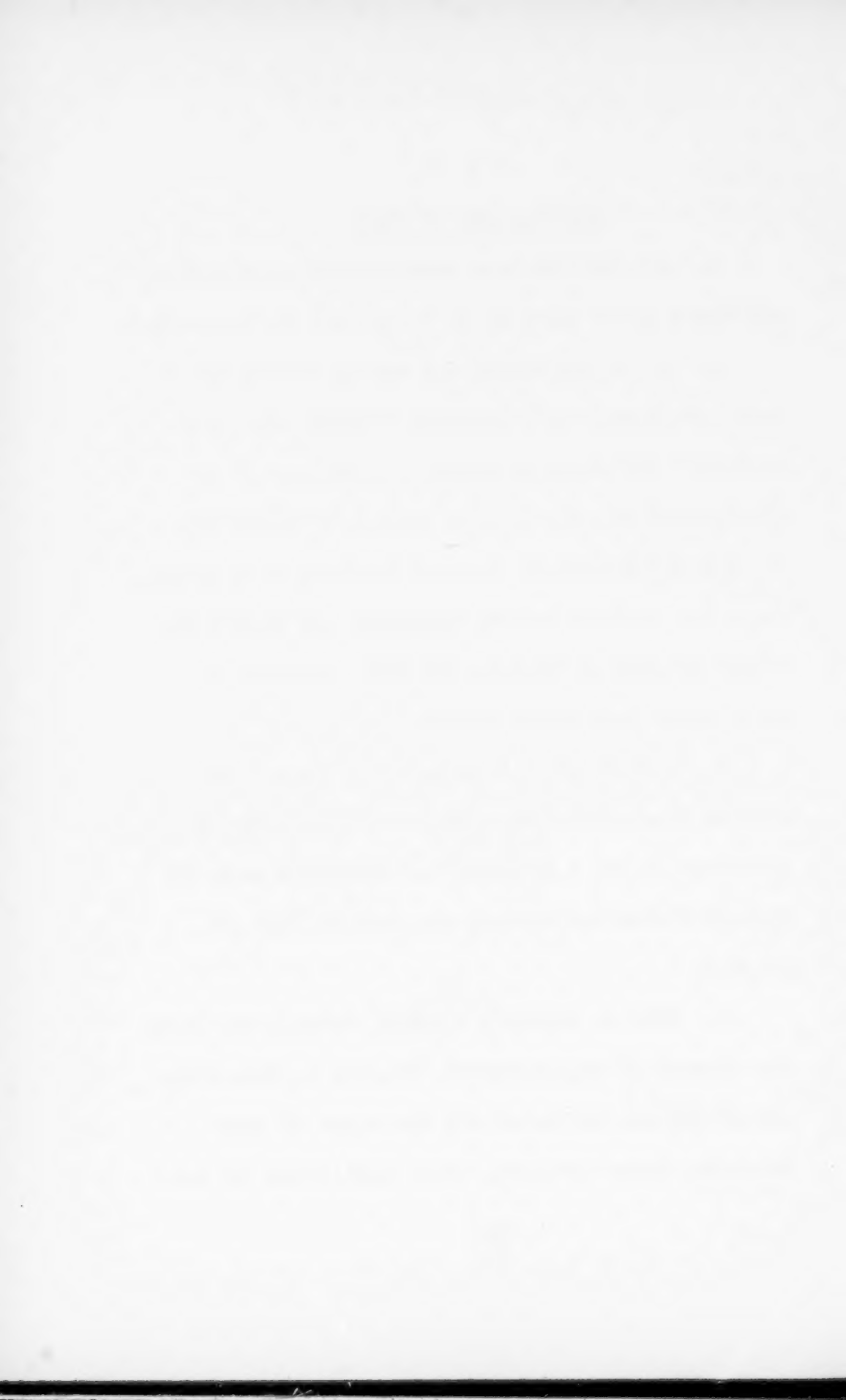
STIPULATIONS OF FACT

1. All parties have been corrently designated and there is no question as to joinder or misjoinder;

2. It is stipulated and agreed that document dated 19 January 1979 labelled "Installment Sales Contract" and attached hereto as "Exhibit 1" is genuine and was executed by Clifton A. Armstrong, Sr. and the Defendant, Fulcher Trucking of Oriental, Inc., and that Clifton A. Armstrong was aboard the vessel Dolphin on February 9, 1979, pursuant to said Installment Sales Contract;

3. That Fulcher Trucking of Oriental, Inc. was the owner of Dolphin, which ownership was so indicated on her documents, the documents were not changed thereafter through the date of loss of Dolphin;

4. That on February 9, 1979, Dolphin was under the command of the Decendent, Clifton A. Armstrong, was at sea six (6) miles off the coast of Cape Hatteras, North Carolina, under conditions, to wit:



weather conditions at the time of the casualty were: visibility, 5 miles, snowy, NE winds 39 knots, seas NE 7-8 feet, air temperature 27°F, and water temperature 35°F;

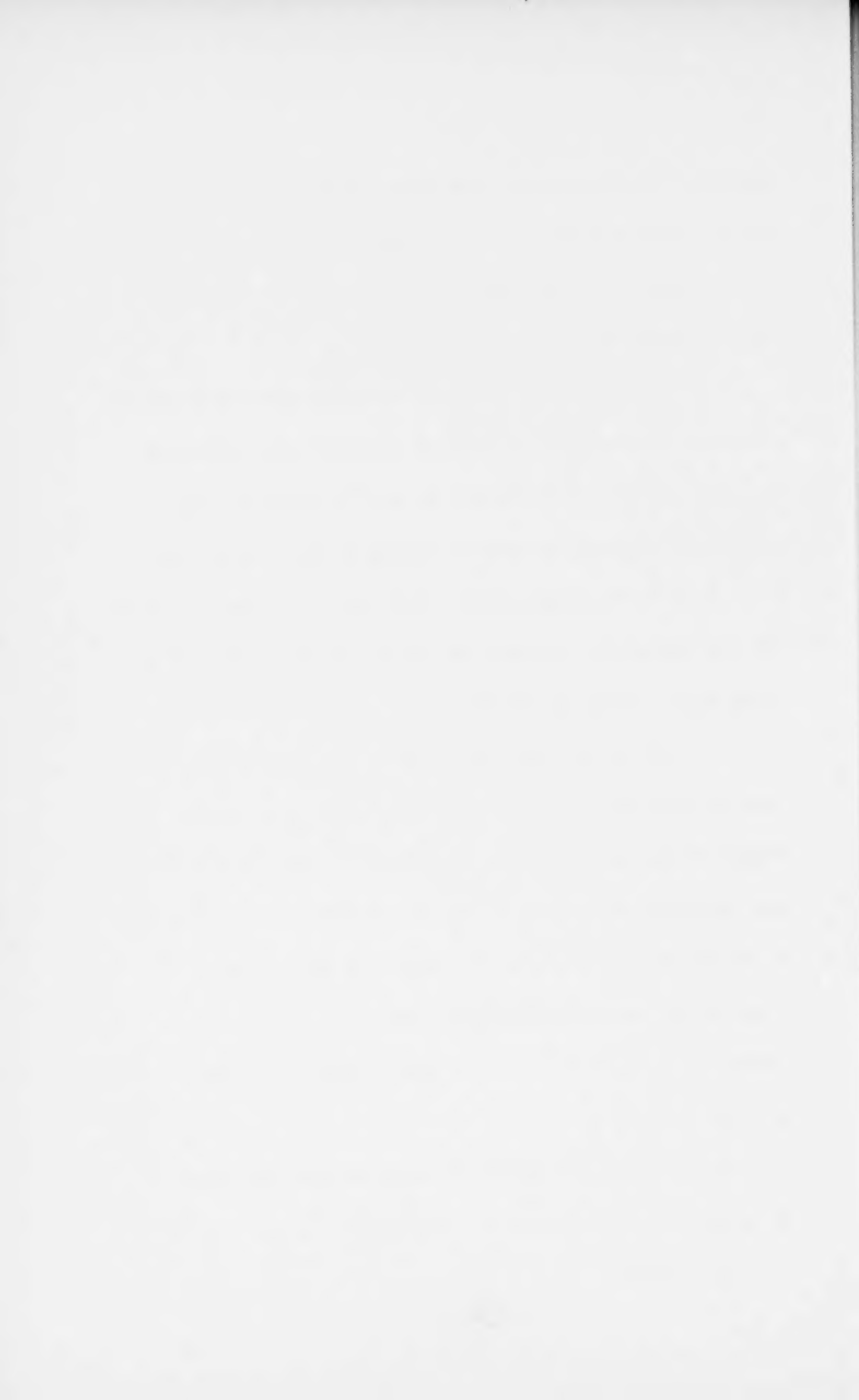
5. That before Dolphin totally sank and while she was foundering, a rescue attempt was effected by the vessel CAPT. STACY II and Clifton A. Armstrong died before rescue attempts were completed.

6. It is stipulated that, at the time of death of the Decedent, he was 46 years of age and had a life expectancy of 28.21 years;

7. It is stipulated that on or about the 2nd day of February, 1979, the vessel was hauled by Neuse Waves Shipyard in Oriental, N. C., the bottom was painted and a new transducer was installed and a 13/16 inch thru-hull fitting was used. The transducer was placed approximately 1/3 of the vessel's length aft of the bow forward of the engine;

8. Plaintiff and Defendant stipulate that this matter will be tried without a jury;

9. Facts:



a. Plaintiff, Administratrix of the Estate of Clifton A. Armstrong, is a North Carolina resident.

b. The Defendant, Fulcher Trucking of Oriental, Inc., is a North Carolina corporation with its principal office in Oriental, North Carolina.

II

From the evidence presented at trial, the Court makes the following

ADDITIONAL FINDINGS OF FACT

1. Defendant, Fulcher Trucking of Oriental, Inc., is one of several business interests of Chris Fulcher and Gaston B. Fucher, Jr. and their family. The primary business of the Defendant corporation is hauling seafood produced by other businesses owned by the Fulchers, one of which is C & G Seafood House which is engaged in processing seafood.

2. Prior to January 1979, most of the product processed at G & C Seafood House came from privately owned boats, although in the past members of the

Fulcher family have owned and operated fishing trawlers.

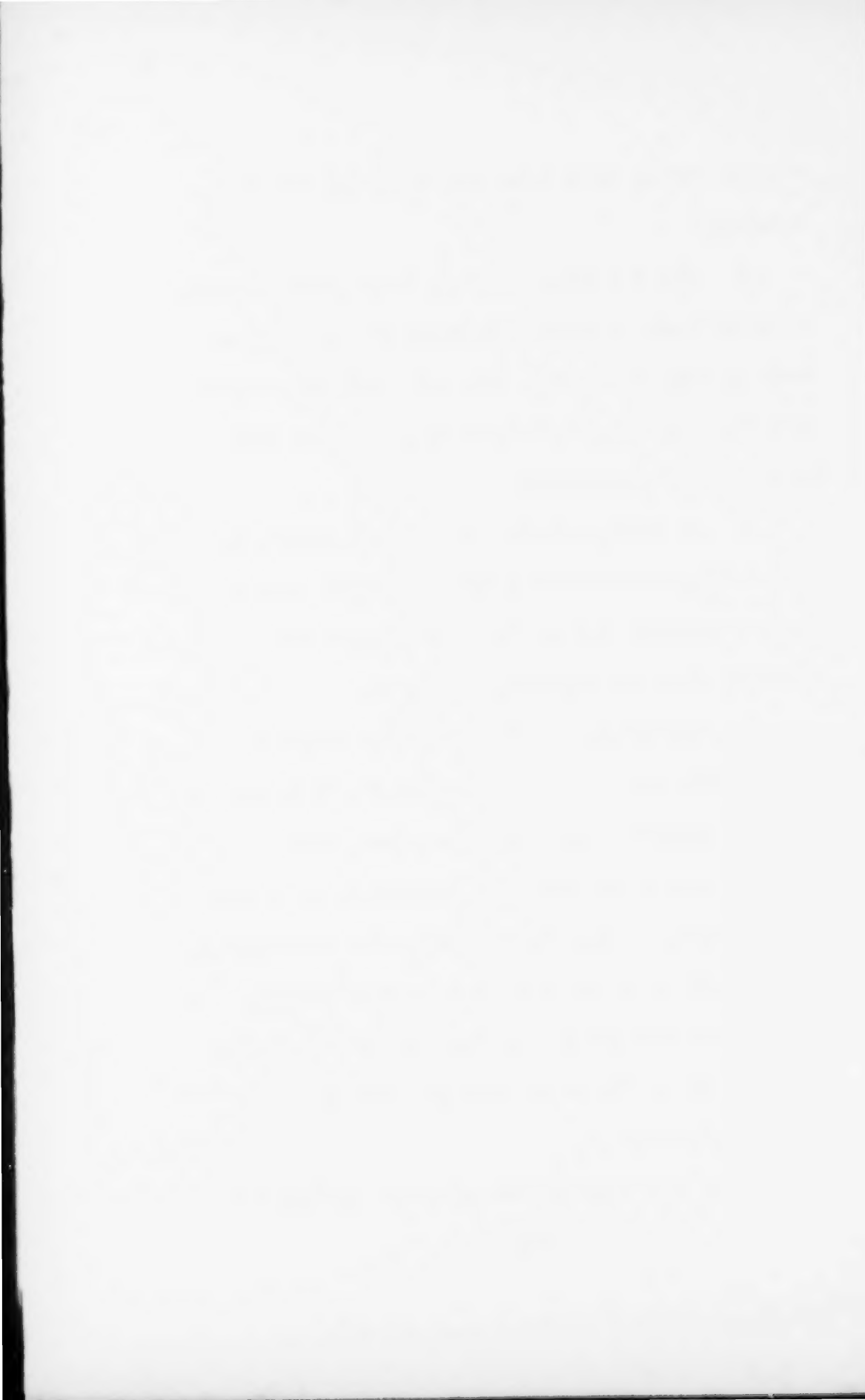
3. The Fulchers, through their seafood house, advanced cash or credit to boats for provisions such as gas, groceries, ice, etc. and deducted the amounts from the proceeds of catches that were brought in and processed.

4. In early January 1979, the Fulchers became aware that the F/V Dolphin was for sale and, needing another boat to produce seafood for their company, made arrangements to buy it.

5. Thereafter, title to the F/V Dolphin was transferred from the former owner, S & B Enterprises, Inc., to Fulcher Trucking of Oriental, Inc.

6. Gaston Fulcher, Jr., president of Defendant corporation, was familiar with the F/V Dolphin, having seen it in the area before, but did not inspect the same before purchasing it. He merely looked at it in the water and saw nothing outwardly wrong with it.

7. At the time of the purchase, Defendant



insured the F/V Dolphin in the amount of \$25,000.00, which sum was duly paid to Defendant after the vessel's loss.

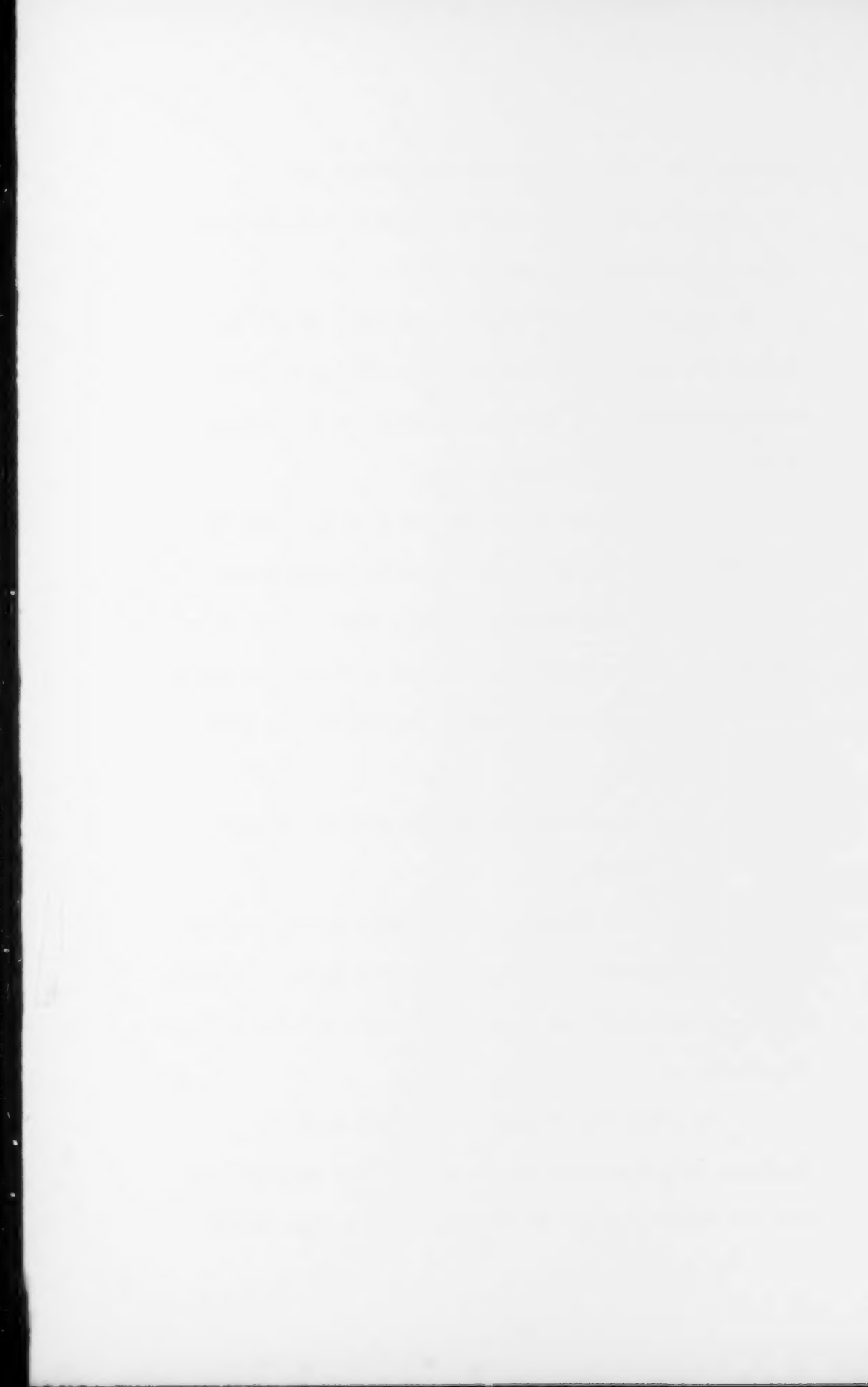
8. Plaintiff's Decedent was well known to Gaston Fulcher, Jr., and members of his family, having worked for them as captain on a fishing vessel some years before.

9. At or about the time the F/V Dolphin was purchased by Defendant, negotiations were begun with Plaintiff's Decedent to sell the vessel to him. The negotiations culminated in an installment sales contract entered into between Defendant and Plaintiff's Decedent.

10. The installment sales contract provided, among other things,

a. That Decedent would pack product with Defendant between the opening of the North Carolina shrimp season and the middle of March of the following year;

b. For the establishment of a joint checking account into which all moneys received by the F/V Dolphin were to be deposited. The joint



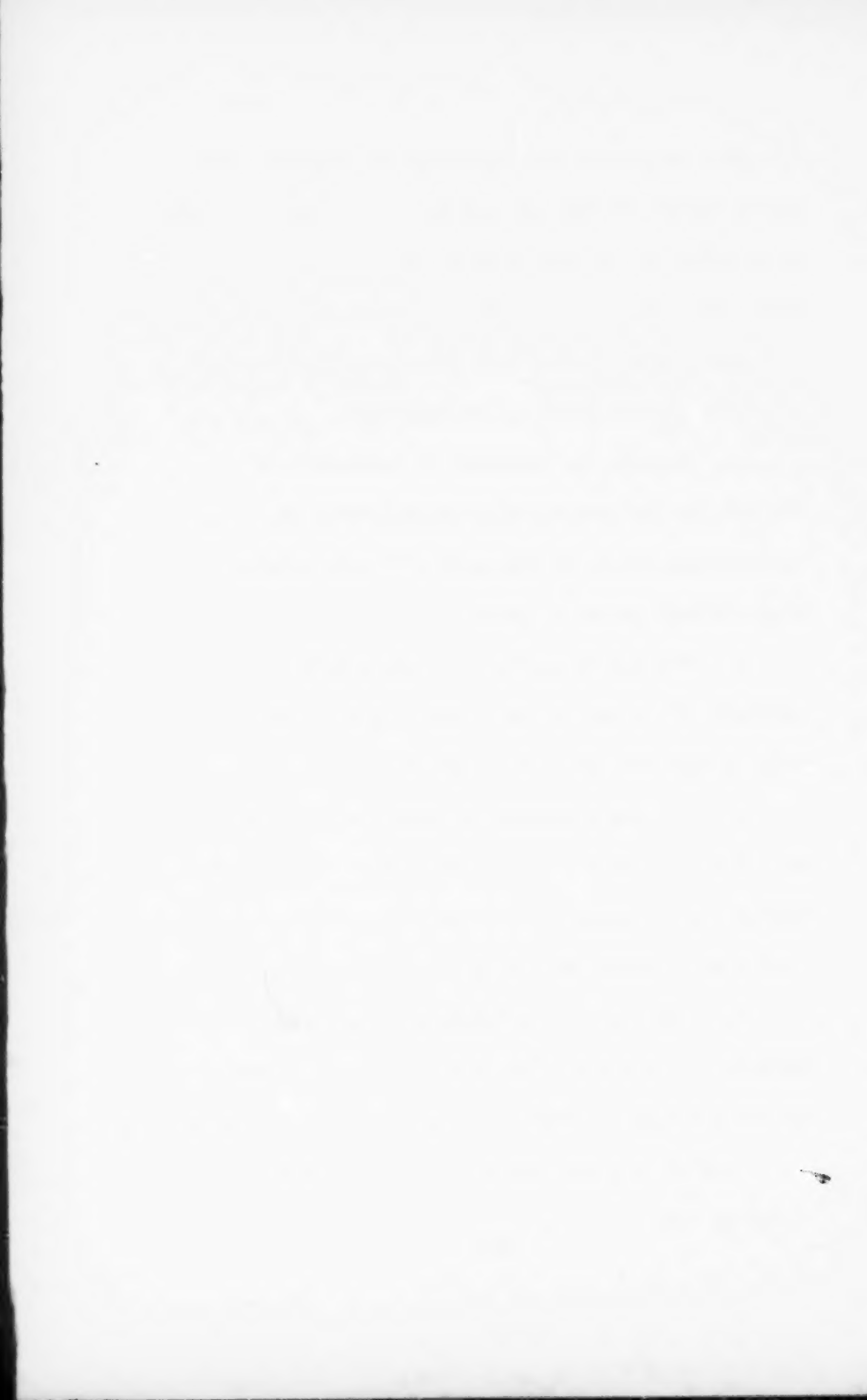
account, requiring the signature of Decedent and either Chris Fulcher or Gaston B. Fulcher, Jr., was to be used to pay the crew and captain, boat insurance, boat maintenance, necessary expenses of the boat and the principal and interest due Defendant under the installment sales contract;

c. Payment by Decedent to Defendant of \$28,000.00 through monthly installments of \$639.83 beginning in February 1979 and continuing through January 1984;

d. For the transfer from Defendant to Decedent of title to the vessel "upon payment in full of the sum set forth herein;"

e. For the purchase of additional equipment for the vessel by the Defendant with the cost thereof to be added to the amount due under the installment sales contract;

f. The right of Defendant, after sixty days default of Decedent, "to take immediate possession of F/V DOLPHIN, retain all moneys previously paid . . . and pursue any and all other remedies provided by law."



11. Plaintiff's Decedent had the vessel hauled and new equipment installed thereon. Thereafter, the vessel was carried to Defendant's place of business and outfitted for its first voyage.

12. Prior to 9 February 1979, the F/V Dolphin made one fishing trip and the proceeds therefrom were put into the joint checking account and disbursed according to the terms of the installment sales contract.

13. On 9 February 1979, the F/V Dolphin was fishing some nine to twelve miles off Hatteras Inlet and was enjoying a successful voyage when the weather took a sudden change for the worse.

14. Because of the weather the F/V Dolphin started to port during which time it began taking on water.

15. Although the vessel was leaking some around the rudder stock, the pumps, which were working, were adequate to rid the vessel of that water. The vessel was leaking through the hull into the engine room and the hold.

16. After taking on considerable water, the

vessel's engines submerged causing a loss of power. With the pumps not working the crew donned life jackets and abandoned ship.

17. Responding to a call for help, the vessel Capt. Stacy II came to the crew's rescue and got a line to each of the crewmen.

18. Plaintiff's Decedent and the other crewmen were in the water from five to ten minutes with the Decedent providing encouragement to the others to continue the struggle.

19. Plaintiff's Decedent died in the water shortly before being pulled onto the vessel Capt. Stacy II.

20. The cause of death of Plaintiff's Decedent was "exposure (hypothermia)" due to "sea water emersion."

21. The complaint in this action was filed on 5 February 1982.

III

In reaching its decision, the Court is guided by the following



PRINCIPLES OF LAW

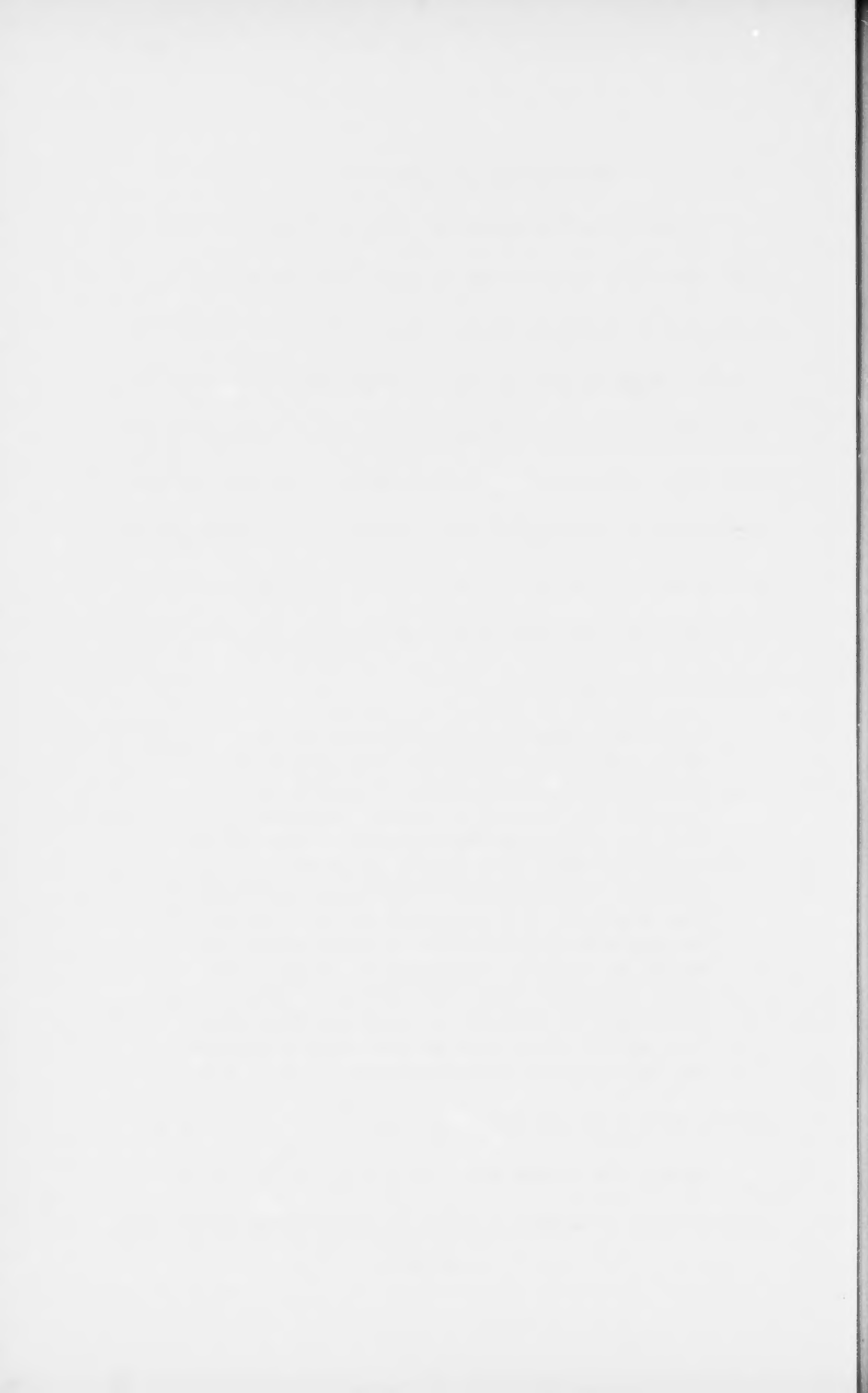
Under general maritime law, a shipowner has an absolute duty to provide a seaworthy vessel.

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94 (1946); Smith v. Ithaca Corp., 612 F.2d 215, 219 (5th Cir. 1980). "[T]he shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability." Mitchell, 362 U.S. at 549. As the Court of Appeals for the Fifth Circuit has stated:

Under the seaworthiness doctrine, a ship owner is liable for the death of an individual proximately caused by failure to furnish a vessel reasonably fit for its intended purpose. The [ship owner's] duty to protect [plaintiff] against the hazards of maritime services was absolute and included an obligation to provide [plaintiff] 'a safe place in which to work'. [Vickers v. Tuney, 290 F.2d 426, 430 (5th Cir. 1961)]. The Defendant's failure to perform this duty 'no matter what the excuse' was a breach of the duty of seaworthiness. Id.

Smith, 612 F.2d at 219.

Under the Jones Act, 46 U.S.C. §688, an employer owes a seaman a duty of reasonable care. See



id. "[A] seaman's employer is liable if his negligence played any part, even the slightest, in producing the seaman's death." Id. at 220 (citations omitted).

In addition, the DOHSA provides a cause of action for death "caused by wrongful act, neglect, or default occurring on the high seas beyond a maritime league from the shore of any State. . . against the vessel, person, or corporation which would have been liable if death had not ensued." 46 U.S.C. §761. The marine league is defined as three nautical miles from the shore of any state. Smith, 612 F.2d at 219 N.9. DOHSA also provides seamen a remedy for unseaworthiness on the high seas. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 N. 12 (1970); Smith, 612 F.2d at 220. DOHSA provides for "a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C. §762. Mobil Oil Corp. v. Hugginbotham, 436 U.S. 619 (1978), has "construed DOHSA to forbid general maritime law supplementation of the elements of



compensation for which the Act provides." American Export Lines, Inc. v. Alez, 466 U.S. 274, 282 (1980).

Prior to 6 October 1980, the statute of limitations for a suit pursuant to DOHSA was two years. See 46 U.S.C. §763 (1975). In order to establish a uniform national statute of limitations for maritime torts, however, Congress enacted the 1980 Act Limiting Maritime Tort Claims (1980 Act), which became effective 6 October 1980. 46 U.S.C. §763 (a) (Supp. 1981); H.R. Rep. No. 737, 96th Cong., 2d Sess. 1, reprinted in 1980 U.S. Code Cong. & Ad. News 3303. The 1980 Act has been interpreted to be retroactive, particularly where a claim arose but did not expire before a change in the statute of limitations that expanded the time available to bring this action. Burden v. Evansville Materials, Inc., 550 F. Supp. 41, 44 (W.D. Ky. 1982). See contra Gribshaw v. Ohio Barge Lines, Inc., 532 F. Supp. 866 (W.D. Penn. 1982); Belmonte v. Scindia Steam Navigation Co., 523 F. Supp. 530 (S.D.N.Y. 1981); Bush v. Sumitomo Bank and Trust Co., 513 F. 1051 (E.D. Tex. 1981).



Based upon its factual findings and guided by the foregoing legal principles, the Court makes the following:

CONCLUSIONS OF LAW

1. The Defenant was the owner of the vessel F/V Dolphin on 9 February 1979.
2. The vessel F/V Dolphin was unseaworthy in that the vessel was not reasonably fit for its intended purposes. In addition, the Defendant failed to protect Plaintiff against the hazards of maritime service.
3. The death of Plaintiff's Decedent was proximately caused by the unseaworthy condition of the vessel F/V Dolphin on 9 February 1979. See 46 U.S.C. § 761.
4. Decedent's death occurred on the high seas beyond a marine league from the shore of North Carolina. Id.
5. Plaintiff is the personal representative of Decedent and maintains this suit on behalf of herself, children and other dependents. Id.
6. Defendant is the corporation which would



have been liable if death had not ensued. Id.

7. The 1980 Act, U.S.C. §763(a), establishing a three-year statute of limitations for recovery of damages for personal injury or death arising out of marine tort, is retroactive. Therefore, this action was filed within the statute of limitations.

8. Having found Defendant liable under the DOHSA, the Court finds it necessary to determine the Plaintiff's claim under the Jones Act.

V

DAMAGES

Although the parties presented some evidence and some argument on the issue of damages, the Court desires to hear further evidence thereon. Accordingly, the Clerk is directed to recalendar this matter for further evidence on the issue of damages.

AND IT IS SO ORDERED.

This 31 March 1983.

/s/ W. Earl Britt

W. EARL BRITT

United States District Judge



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NEW BERN DIVISION

| | | |
|----------------------------|---|------------------|
| JUNE KEEL GASKILL |) | No. 82-11-CIV-4A |
| (formerly June Keel |) | |
| Armstrong), Administratrix |) | F I L E D |
| of the Estate of CLIFTON |) | |
| ALEX ARMSTRONG, SR., |) | Jul 7 1983 |
| deceased, |) | |
| Plaintiff |) | |
| |) | |
| v. |) | <u>O R D E R</u> |
| |) | |
| FULCHER TRUCKING OF |) | |
| ORIENTAL, INC., |) | |
| Defendant |) | |

By Memorandum Opinion dated 31 March 1983,
Defendant was held liable to Plaintiff under DOHSA,
46 U.S.C. §§ 761-768 (1975), for the death of
Plaintiff's intestate. The matter is now before me
on the issue of damages.

The Statute provides that "the recovery. . .
shall be a fair and just compensation for the
penuniary loss sustained by the persons for whose
benefit the suit is brought. . ." 46 U.S.C. § 762.

Although evidence has been presented as to
expenses necessary for day-to-day living of the
Decedent's family, the Court determines the



"penuniary loss" suffered to be the amount the Decedent would have earned had he continued to live, less his normal living expenses, plus actual expenses incurred as a result of his death.

The only evidence with regard to the Decedent's earnings is the testimony of the widow and a copy of the 1977 federal income tax return. From these it is clear that the Decedent's gross income for 1977 was \$18,831. From schedules attached for the purpose of income averaging, it is also apparent that his gross income for earlier years was as follows:

| | |
|------|--------------|
| 1973 | \$ 7,759.00 |
| 1974 | \$ 9,271.00 |
| 1975 | \$ 7,480.00. |

The Decedent's 1976 gross income is not determinable from the evidence presented. Nevertheless, the above figures give the Court sufficient basis on which Decedent's average earnings can be determined. The Court finds as a fact that the Decedent's average annual income was \$10,000.

Most of Decedent's expenses while pursuing his occupation being accounted for without regard

to his earnings, the Court determines that Decedent's personal expenses would have been 15% of his average annual income, or \$1,500. Thus, his dependents could have expected to receive from decedent, had he continued to live, a net of \$8,500. annually. For 1979, 1980, 1981, 1982, and one-half of 1983, these amounts are not subject to any discount. Thus, the damages due from date of death until the present are $4.5 \times \$8,500 = \$38,250$.

Decedent having a life expectancy of 28.21 years, there remains 23.71 years to be computed. As \$8,500. per year, this makes \$201,535. However, The Court must reduce this amount to its present value. The Court determines that Plaintiff can reasonably expect to earn approximately 8% interest on any sum awarded. Seventy-Five Thousand (\$75,000) Dollars invested at 8% interest for the next 23.71 years would yield in excess of \$140,000. When added to the \$75,000., this would net the Plaintiff approximately the Decedent's anticipated earnings.

Plaintiff incurred funeral expenses of \$3,000.

Thus, Plaintiff is entitled to recover of



Defendant:

| | |
|------------------|--------------------|
| Damages to date | \$ 38,250.00 |
| Future earnings | \$ 75,000.00 |
| Funeral expenses | <u>\$ 3,000.00</u> |
| TOTAL | \$ 116,250.00. |

Although the statute requires the damages apportioned among the "persons for whose benefit the suit is brought," the Court determines that all of the damages should be paid to the widow, June Keel Gaskill. At the time of his death, Clifton Alex Armstrong, Sr., left surviving two minor children, Clifton A. Armstrong, Jr., then age nine, and Lisa Armstrong, then age seven. Their entitlement to support from their father ceases when they arrive at their majority. Until then Plaintiff, as their mother, is their natural guardian and also responsible for their care and upkeep. Thus, any amount which might be computed separately for them would be paid to their mother for their use and benefit.

It is, thereupon, ORDERED that Plaintiff have and recover of Defendant the sum of ONE HUNDRED



SIXTEEN THOUSAND, TWO HUNDRED FIFTY DOLLARS

(\$116,250.), together with interest thereon at the rate of 9.59% per annum until paid and the costs of this action.

AND IT IS SO ORDERED.

This 7 day of July, 1983.

/s/ W. Earl Britt

W. EARL BRITT

United States District Judge

UNPUBLISHED

UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 83-5099

June Keel Gaskill (formerly
June Keel Armstrong)
Administratrix of the Estate
of Clifton Alex Armstrong, Sr.,
deceased,

Apellee,

v.

Fulcher Trucking of Oriental,
Inc.,

Appellant.

Appeal from the United States District Court for
the Eastern District of North Carolina, at New
Bern. W. Earl Britt, District Judge. (C/A82-0011)

Argued: January 10, 1984

Decided: February 28, 1984

Before HALL and ERVIN, Circuit Judges; and BUTZNER,
Senior Circuit Judge.

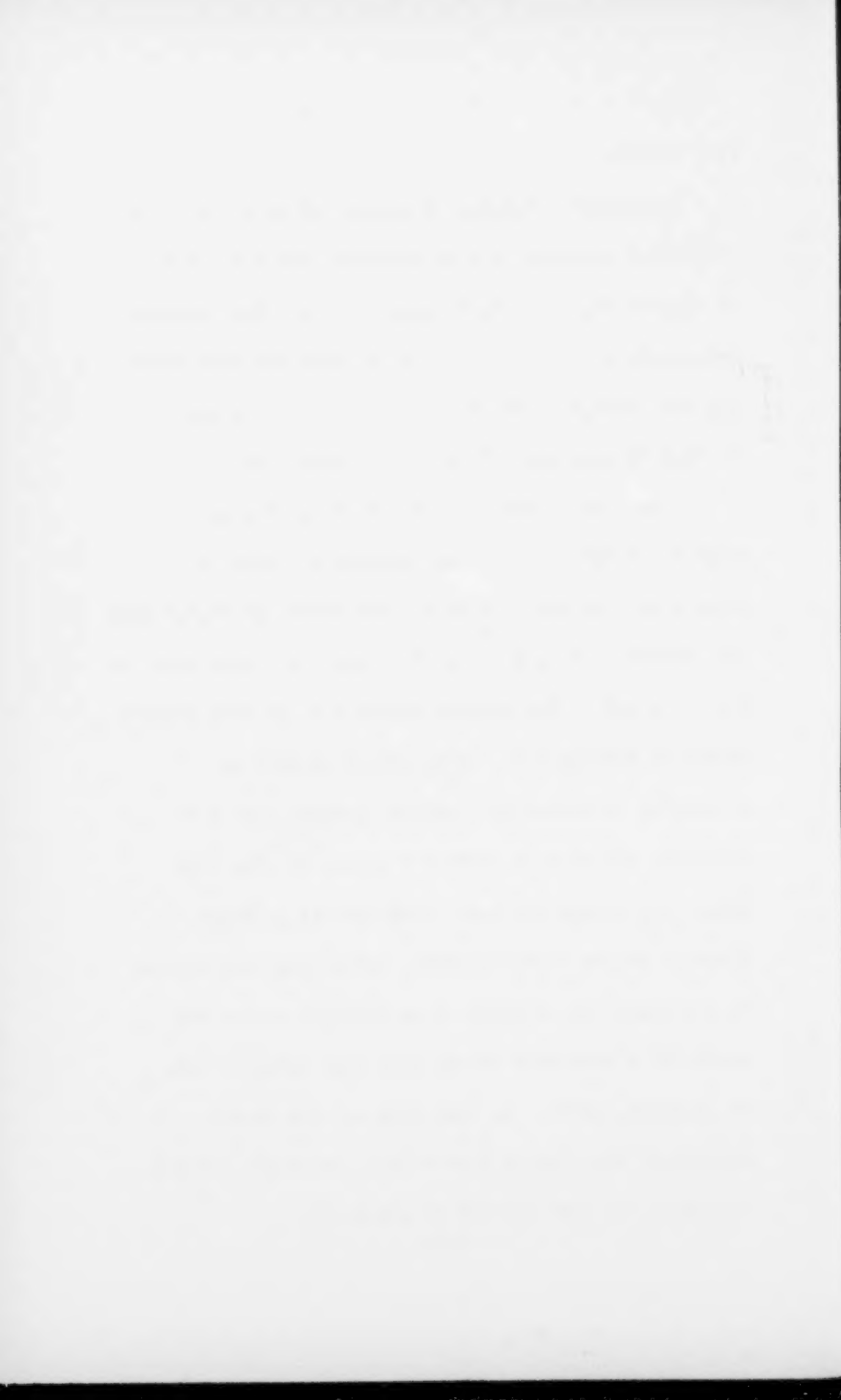
C. R. Wheatly, Jr., Stevenson L. Weeks (Wheatly,
Wheatly & Nobles, P.A. on brief) for Appellant;
Neil B. Whitford (Cooper and Whitford on brief)
for Appellee.



PER CURIAM:

Defendant, Fulcher Trucking of Oriental, Inc. (Fulcher) appeals from a judgment entered in favor of Plaintiff, June Keel Gaskill, awarding damages amounting to \$116,250.00, plus interest and costs, for the wrongful death of Plaintiff's husband, Clifton Armstrong. Finding no error, we affirm.

Plaintiff, administratrix of Armstrong's estate, filed this action against Fulcher in admiralty, as well as under the Death on High Seas Act (DOHSA), 46 U.S.C. § 761, and the Jones Act, 46 U.S.C. § 688. The action arose out of Armstrong's death on February 9, 1979, while aboard an allegedly unseaworthy fishing vessel, the F/V DOLPHIN, which sank during a storm on the high seas, six miles off the North Carolina coast. Shortly before the incident, Armstrong had agreed to purchase the DOLPHIN from Fulcher under the terms of a contract which they had entered into in January, 1979. At the time of his death, Armstrong was aboard the vessel, pursuant to the contract, as the DOLPHIN'S commander.



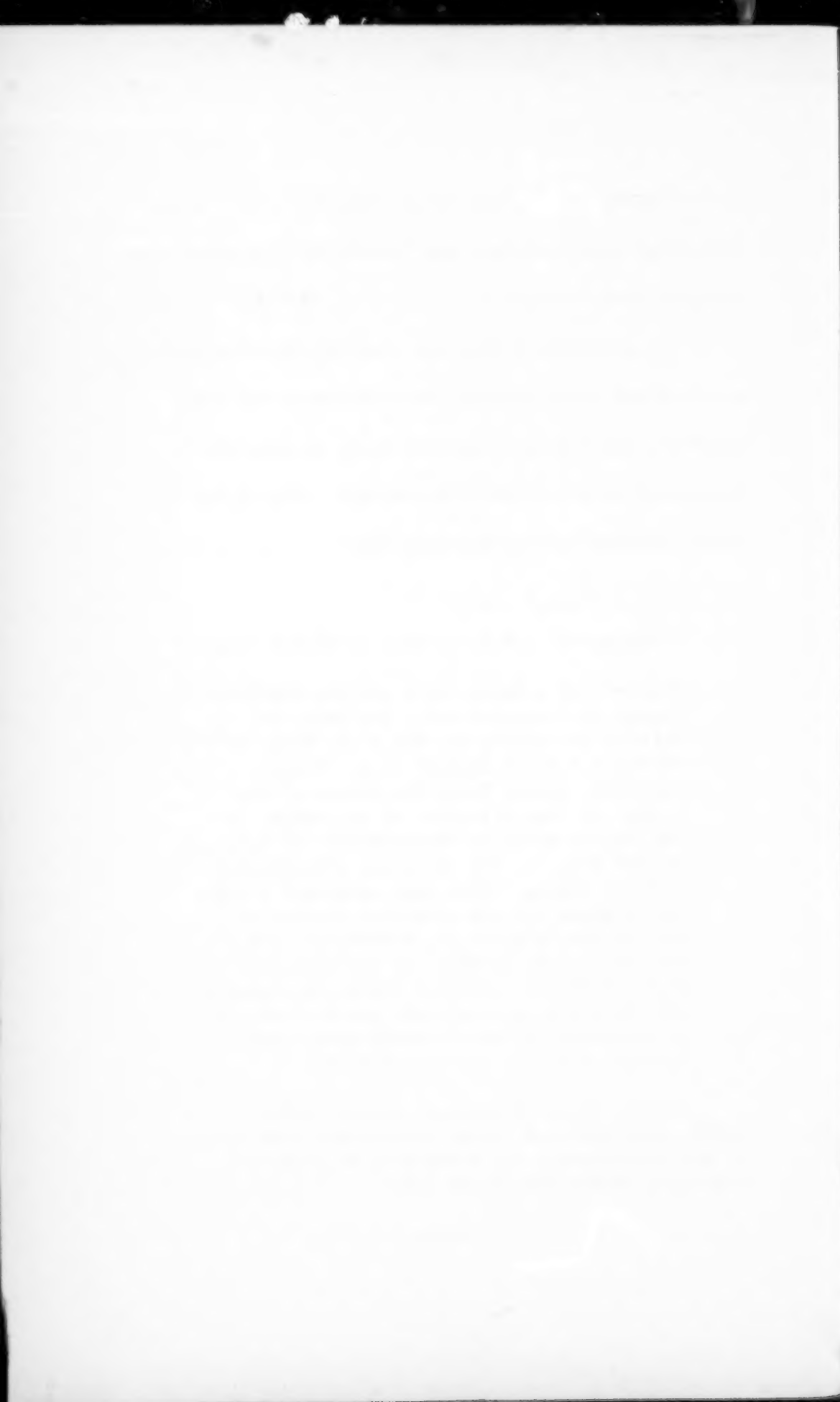
Following a bench trial, the district court concluded that Fulcher was liable to Plaintiff for damages under DOHSA.^{1/}

In holding Fulcher liable, the district court found that Fulcher was the owner of the DOLPHIN, and had an absolute duty to provide Armstrong with a seaworthy vessel. The trial court further concluded that the

^{1/}DOHSA, 46 U.S.C. § 761, provides that:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league [i.e. three nautical miles] from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Having found defendant liable under DOHSA, the district court concluded that it was unnecessary to determine Fulcher's liability under the Jones Act.



vessel was unseaworthy and that its unseaworthy condition proximately caused Armstrong's death. Fulcher appeals.

On appeal, Fulcher's primary contention is that the district court erred in concluding that appellant was the owner of the DOLPHIN on the date it sank. Appellant argues that the agreement entered into with Armstrong in January, 1979, was an installment sales contract, governed by general commercial, as opposed to maritime, law. Fulcher maintains that under this agreement title to the DOLPHIN had already passed to Armstrong and that the only interest retained in the vessel by Fulcher was in the nature of a security interest. Fulcher thus contends that it was not the DOLPHIN's owner on the date of its loss, and that, consequently, it cannot be held accountable for Armstrong's death under DOHSA.

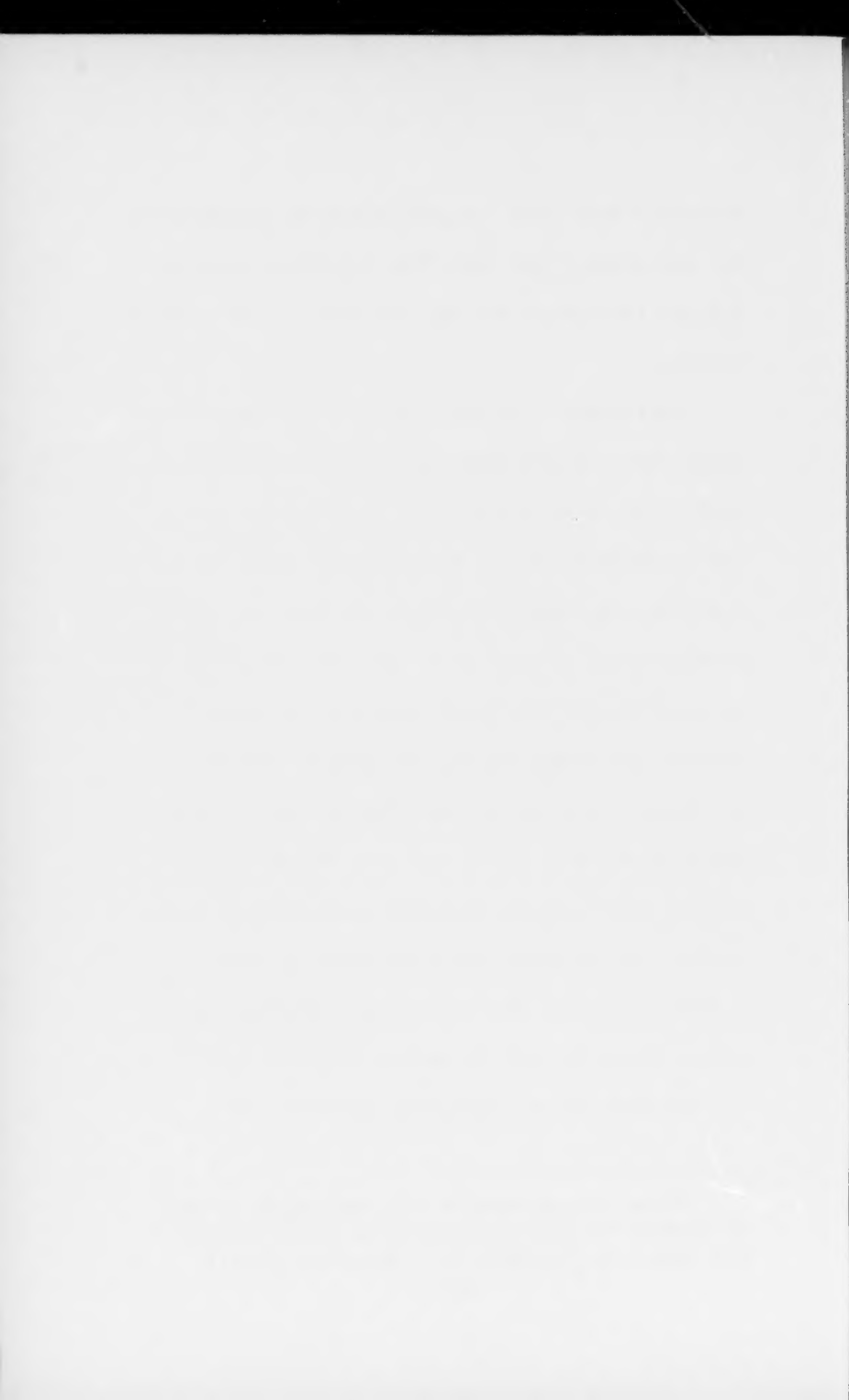
Upon consideration of the record, briefs, and oral argument, we find that Fulcher's contentions lack merit. In the first place, appellant stipulated below that "it was the owner of



DOLPHIN," that this "ownership was so indicated on her documents," and that "the documents were not changed thereafter through the date of the loss of DOLPHIN."

Furthermore, as the district court noted, the sales contract provided that: (1) title to the DOLPHIN would be transferred to Armstrong until the purchase price had been paid in full; (2) Armstrong was required to use the boat to "pack product" with Fulcher (i.e. sell his catch to Fulcher) during the North Carolina shrimping season; (3) Armstrong was required to deposit all moneys received by the DOLPHIN into a joint checking account, which was used to pay himself and his crew and all expenses associated with the vessel; (4) no check could be drawn on that account unless it was signed by Armstrong and either Chris Fulcher or Gaston Fulcher, Jr.;^{2/} (5) the cost of any equipment purchased by

^{2/}The record reveals that defendant is one of several business interests of Chris Fulcher and Gaston B. Fulcher, Jr., and their family.



Fulcher for Armstrong during the contract period would be added with interest to the amount Armstrong already owed; (6) in case of Armstrong's default, Fulcher retained the right, after sixty days "to take immediate possession of F/V DOLPHIN, retain all moneys previously paid by [Armstrong] . . . and pursue any and all other remedies provided by law."

In view of these facts, including Fulcher's stipulation of ownership and the large degree of control it retained over the vessel under its contract with Armstrong, we hold that the district court did not err in concluding that Fulcher was the owner of the DOLPHIN. We have considered appellant's remaining contentions, including its claim that the vessel was seaworthy, and find them likewise without merit.

Accordingly, for the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

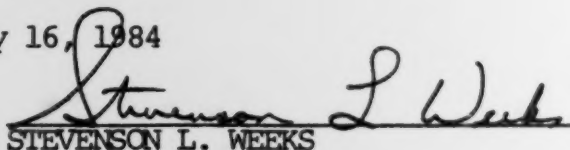


Designation of Corporate Relationship

Fulcher Trucking of Oriental, Inc., filing this petition for certiorari, states that:

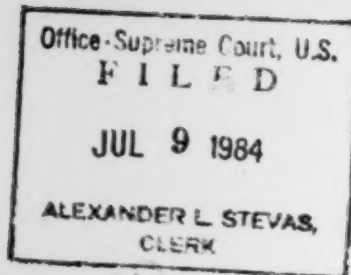
- (a) This is the original Designation of Corporate Relationship.
- (b) Fulcher Trucking of Oriental, Inc. is not owned by any parent corporation.
- (c) Fulcher Trucking of Oriental, Inc. does not have an ownership interest in any subsidiaries.
- (d) Fulcher Trucking of Oriental, Inc. does not have any affiliates.

Dated: May 16, 1984


STEVENSON L. WEEKS

Attorney for Petitioner
Fulcher Trucking of
Oriental, Inc.

P.O. Drawer 360
Beaufort, N. C. 28516
Telephone: (919) 728-3158



FILE NO. 83 1994

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 1983 TERM

FULCHER TRUCKING OF ORIENTAL, INC.

Petitioner

v.

JUNE KEEL GASKILL, ADMINISTRATRIX
OF THE ESTATE OF CLIFTON ALEX ARMSTRONG, SR.

Respondent

On Writ of Certiorari
To The United States Court of Appeals
For the Forth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

| | |
|------------------------------|----|
| Table of Cases | i |
| Table of Statutes | ii |
| Argument | 1 |
| Summary | 6 |
| Certificate of Service | 8 |

TABLE OF CASES

| | |
|---|---|
| <u>Fosen v. United Technologies Corporation,</u> 633 F 2d 203 | 6 |
| <u>Kermarec v. Compagnie Generale</u> <u>Transatlantique,</u> 358 U.S. 625, 79 S Ct. 406..... | 5 |
| <u>Mitchell v. Trawler Racer, Inc.,</u> 362 U. S. 539, 80 S Ct. 926..... | 4 |
| <u>Shipping Company v. Sieracki,</u> 328 U.S. 85, 66 S Ct. 872..... | 4 |
| <u>Van Carpals v. S.S. American Harvester,</u> 297 F 2d 9..... | 4 |

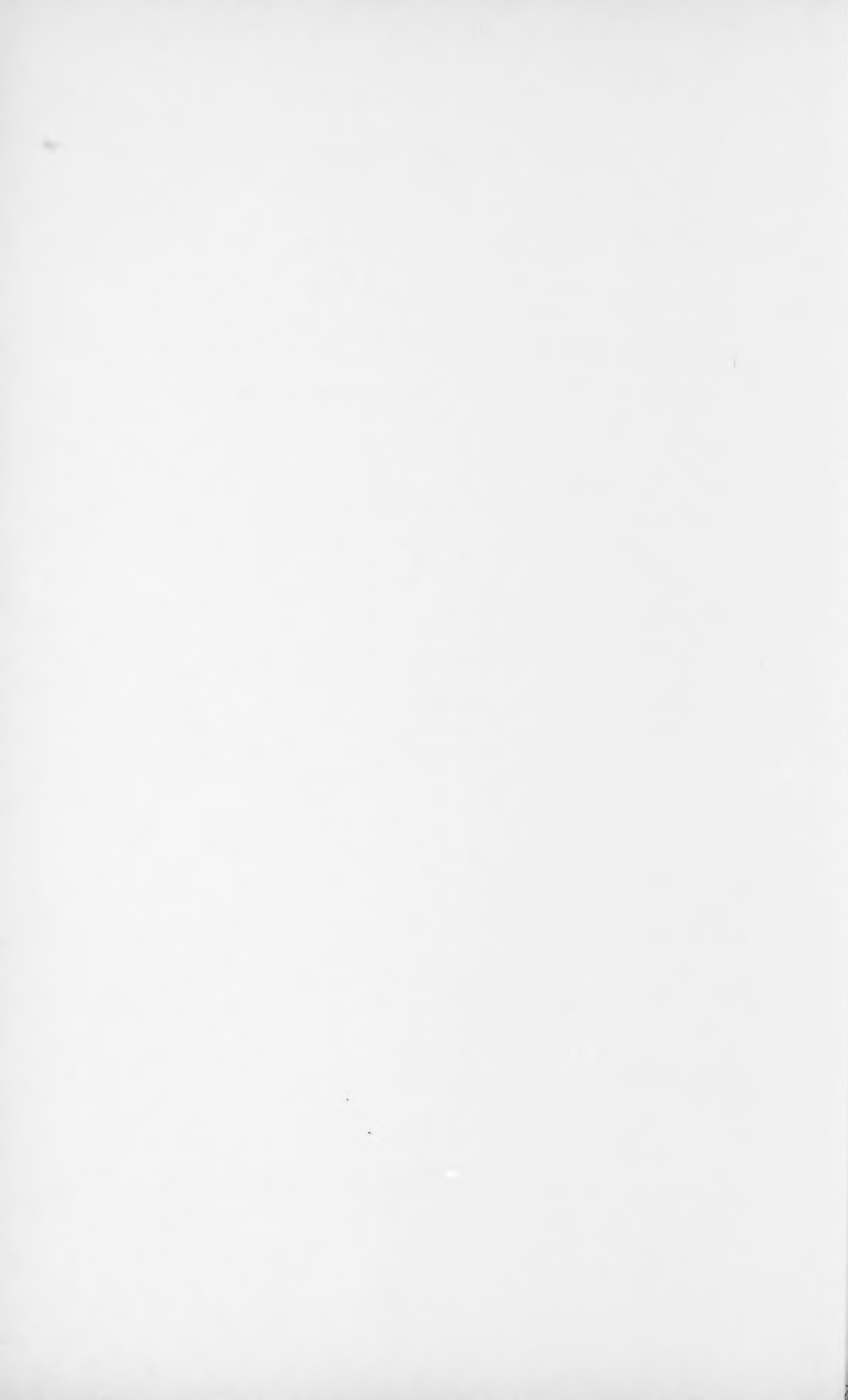


TABLE OF STATUTES

| | |
|--|---|
| <u>Death on the High Seas Act, 46 U.S.C.</u> | |
| Sec 761 | 5 |



ARGUMENT

There are no special or important reasons for this honorable court to review the decisions of the lower courts in this case. The trial court's decision was based essentially on findings that underscore the special, perhaps unique, facts at the heart of this matter. The opinion of the Court of Appeals for the Fourth Circuit affirms the abundance of evidence supporting the District Court's findings of fact and ultimate judgment. This case does not involve principals of law that will be of use in other fact situations. Existing law, when applied by the lower courts to the facts of this case, was quite adequate to lead to the proper decision that was rendered; a decision consistent with cases decided in this and other federal courts.

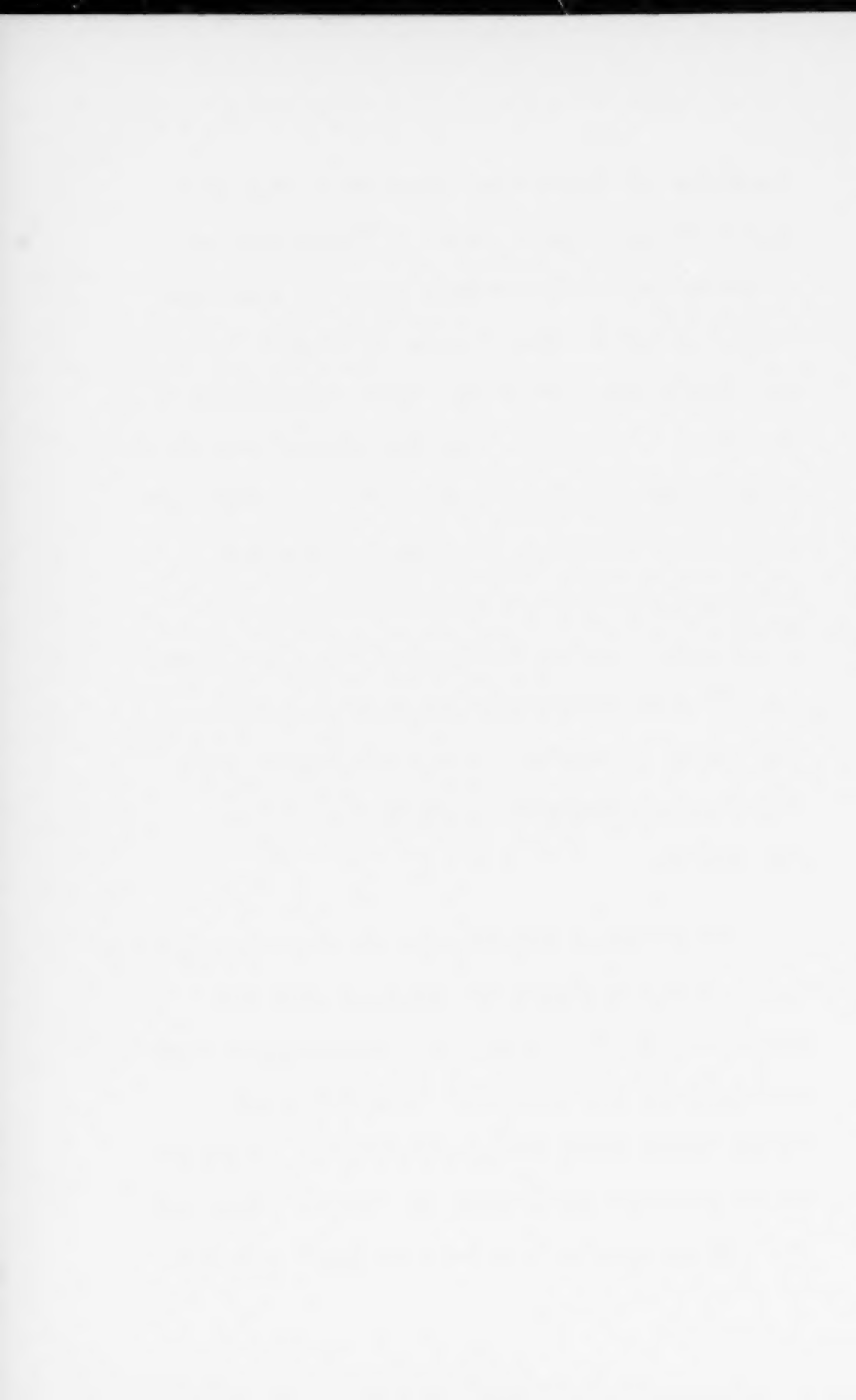
In the first question presented

(Petition, page i), petitioner assumes that the District Court was able to assess liability for unseaworthiness against it as an "owner" simply because it retained title as seller of a vessel under an installment sales contract. The second question presented (Petition, page i) challenges the trial court's finding that petitioner's stipulation as to ownership made it subject to the duties placed on owners of vessels by statutory and general principals of admiralty law. Respondent argues that the questions presented do not adequately state the decisions of either lower court, and that a thorough understanding of those decisions reveals their correctness.

Petitioner in the Pre-trial Order stipulated that it "... was the owner of the Dolphin, which ownership was so indicated on her documents...." (See

Appendix of Petition, page 3A.) The stipulation was unequivocal. There was no reservation or statement that it was the owner of bare legal title or that equitable ownership was with respondent's decedent. Further, the document, styled "Installment Sales Contract", involved in this case contains so many provisions inconsistent with a traditional installment sales contracts that the lower courts were compelled to find petitioner the owner notwithstanding arguments that the Uniform Commercial Code controlled ownership.

Of primary importance to the District Court and the Court of Appeals was the reservation of significant management type controls in petitioner. The district court found that the document, in addition to an express retention of title, required the respondent's decedent to pack product



with petitioner; required establishment of a joint checking account for the deposit of all moneys received by the Dolphin with expenditures only for certain items stated and only with a co-signature of an officer of the petitioner.

With the finding that the petitioner was the owner, the district court was correct in finding that it had the duty of providing a seaworthy vessel.

Shipping Company v. Sieracki, 328 U.S. 85, 66 S Ct. 872; Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S Ct. 926; Van Carpals v. S.S. American Harvester, 297 F 2d 9. The owner's duty to furnish a seaworthy ship is absolute. Mitchell v. Trawler Racer, Inc., supra; Van Carpals v. S.S. American Harvester, supra. "It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care

towards those lawfully aboard the vessel who are not members of the crew."

Kermarec v. Compagnie Generale

Transatlantique, 358 U.S. 625, 79 S Ct.

406. "The owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." Kermarac v Compagnie

Generale Transatlantique, supra. The

Death on the High Seas Act, 46 U.S.C. Sec

761 provides in relevant part that:

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State..., the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

Breach of the implied warranty of seaworthiness in admiralty is an act of neglect or default under the terms of the Death On The High Seas Act. Fosen v. United Technologies Corporation, 633 F 2d 203.

SUMMARY

In the first instance, the lower courts were entirely correct in finding, for purposes of this case that petitioner was the owner of the Dolphin at the time of sinking. The District Court and the Court of Appeals carefully examined the document labeled "Installment Sales Contract" and found as a result of the controls retained by petitioner that it had not transferred ownership so as to avoid liability for unseaworthiness under maritime law. The subsequent application of the law requiring owners to provide seaworthy vessels was correct. This case

is not in conflict with existing admiralty law. It is simply an application of existing law to facts found by the trial court from abundant evidence.

Respectfully submitted this 5th day of July, 1984.

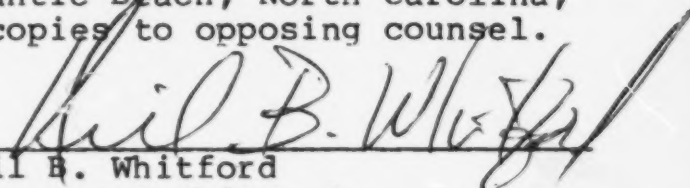
Cooper & Whitford
Attorneys for Respondent

by: 

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CERTIFICATE OF SERVICE

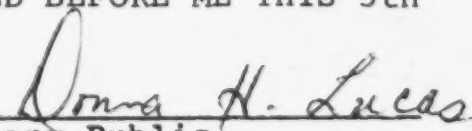
I hereby certify that on this 5th day of July, 1984, I, a member of the Bar of this Court deposited in a United States post office, with first class postage prepaid, the required copies of this Brief, properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, and I further certify that I mailed this same date from Atlantic Beach, North Carolina, the required copies to opposing counsel.


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SWORN TO AND SUBSCRIBED BEFORE ME THIS 5th
DAY OF JULY, 1984.


Notary Public

my commission expires: 12/14/88